Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

LORIN DUCKMAN,

Petitioner,

v.

STATE OF VERMONT,

Respondent.

On Petition For A Writ Of Certiorari To The Vermont Supreme Court

PETITION FOR A WRIT OF CERTIORARI

WILLIAM A. NELSON
52 High Street
Middlebury, Vermont 05753
(802) 388-6781
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a judge who has become embroiled in a bitter, long-term controversy with an attorney, must refer a charge of criminal contempt against the attorney for adjudication by another judge, except when instant punishment is necessary to prevent an obstruction of justice.

2. May a summary contempt order imprisoning an attorney be prompted by the judge's recollection of the attorney's previous rudeness and professional misconduct, unrelated to the case at hand, with the purpose of reforming the attorney's future conduct?

3. If so, is the attorney entitled, under the due process clause, to a hearing and opportunity to contest the court's recollection of these prior incidents?

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ORDERS AND OPINIONS BELOW

The majority and dissenting opinions of the Vermont Supreme Court are reproduced at pp. 1-39 of the Appendix, *infra* (hereinafter App.), and reported at 2006 VT 23 and 898 A.2d 734. The order of the Vermont Supreme Court denying reargument (App. 60), and the orders of the Vermont District Court of August 31, 2004 and October 20, 2004 (App. 40-41 and 42-67, respectively) are not reported.

JURISDICTION

The opinion of the Vermont Supreme Court was entered March 10, 2006, and the petitioner's timely motion for reargument was denied on April 26, 2006. This petition is filed within 90 days of the latter date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall . . . deprive any person of life, liberty or property without due process of law. . . ."

STATEMENT OF THE CASE

Proceedings in the Trial Court

The summary contempt order which is the topic of this petition was issued in the course of a change-of-plea hearing in the Vermont District Court of Addison County,

Vermont, a trial court of general criminal jurisdiction, on August 30, 2004. The case was *State v. Barrows*, Docket Nos. 163-3-03, 602-10-03, and 240-6-04 Ancr, a prosecution for driving under the influence with injury resulting, and for violation of probation. The defense lawyer was Lorin Duckman, the Addison County Public Defender, and the Judge was Hon. Helen M. Toor.

Trial court judges in Vermont are "rotated" from court to court on a regular basis. Judge Toor had been assigned to the Addison County District and Family Courts for a year, since September 2, 2003. August 30, a Monday, was the beginning of her last week, after which she was scheduled for reassignment in another county.

The August 30, 2004 Summary Contempt Order

The *Barrows* case was called at 11:22 a.m. for a hearing expected to result in a change of plea and sentencing. The hearing was videotaped and a copy of the tape was part of the record on appeal. The parties presented the court with a plea agreement, calling for a sentence of two to five years, all suspended but one year for driving under the influence, to be served consecutively to a violation of probation sentence of one to two years.

After preliminary discussions about the amount and manner of restitution, which the agreement did not resolve, and after the victim of the crime had given an unsworn statement (she adamantly opposed the proposed settlement), Judge Toor addressed Mr. Barrows directly, reserving decision on the agreement until after she heard what he had to say about the crime.

THE COURT: All right, Mr. Barrows, I'm going to go over this with you and then I'm going to hear whatever you have to say and I'm going to make a decision at that point about whether I'm going to accept this proposal or not. All right?

MR. DUCKMAN: Judge, I would prefer that you make the decision before he makes any admissions.

THE COURT: Well, I'm not going to because I want to hear what he has to say to me in his allocution.

MR. DUCKMAN: But then we don't have a . . .

THE COURT: That's my view.

MR. DUCKMAN: But then we don't have an agreement.

THE COURT: That's correct and that's the way it works.

MR. DUCKMAN: Okay, well, then we're not going to go forward.

THE COURT: Then you can withdraw the plea. Anything he said is no longer . . .

MR. DUCKMAN: No, I don't agree with that. I think that if you have an agreed-upon sentence.

THE COURT: Mr. Duckman, that's how it always works.

MR. DUCKMAN: But I, but I . . .

THE COURT: I take the plea, I hear what everybody has to say, I decide. One of the things I take into account is what your client has to say

> about his responsibility, that's one of the issues that a judge always takes into account.

App. 2-3 n.2.

In the ensuing dialog counsel and the court discussed the withdrawal of Mr. Barrows' "plea" although, as the Vermont Supreme Court noted, "the real issue was whether the client would withdraw from the agreement, as no plea had yet been taken." App. 2 n.2.[1] Petitioner proposed to withdraw the agreement and offered to return with "a written statement as to what [Mr. Barrows] has to say. . . ." The judge replied that if he withdrew the agreement Mr. Barrows would go to trial, and insisted that petitioner first consult with his client.

> JUDGE TOOR: Well, Mr. Duckman, hold on. I think you need to consult with your attorney, with your client, I don't think you have the right to now withdraw his plea without consulting with him. And I'm sure . . .
>
> MR. DUCKMAN: I think you're interfering with my relationship with him right now judge. I'm withdrawing . . .
>
> JUDGE TOOR: Well, I'm going to ask you – stop.
>
> MR. DUCKMAN: Okay.
>
> JUDGE TOOR: Or I'll hold you in contempt of court.

---

[1] The special rule reserving the client's right to decide what plea to enter, codified in Vermont as Vt. R. Prof. Cond. 1.2(a), therefore did not apply.

MR. DUCKMAN: I haven't done anything contemptuous.

JUDGE TOOR: Stop. Stop. I don't think it's an appropriate thing for a lawyer to withdraw a client's plea without discussing it with the client, the pros and cons, the costs and benefits. You did this once before, I didn't say anything about it. I do not think it's appropriate. I think you need to consult with your client about the risks of going to trial if he does that. If after you've spoken to him, he comes in and tells me he wishes to not go forward I will accept that, but I need to hear it from him, Okay?

MR. DUCKMAN: I think, Judge, what you're doing is interfering with my relationship with my client . . .

JUDGE TOOR: You can . . .

MR. DUCKMAN: I would ask for a continuance right now so I can prepare appropriate papers and perhaps I will come back and ask for a change of venue, but I don't think that I'm prepared to proceed.

JUDGE TOOR: Well I'm not accepting that request. So why don't you go out . . .

MR. DUCKMAN: Well, I'd ask for a continuance . . .

JUDGE TOOR: No.

MR. DUCKMAN: I think it's inappropriate.

JUDGE TOOR: Go speak with your client.

MR. DUCKMAN: I think it's inappropriate to threaten me with contempt.

> JUDGE TOOR: Stop. Mr. Duckman, I told you what to do. Go speak with your client. I will be available in ten minutes once you've talked to him.
>
> MR. DUCKMAN: Judge, I don't think you can tell me to go talk to my client.
>
> JUDGE TOOR: Well, I just did.
>
> MR. DUCKMAN: But I'm not going to do it.
>
> JUDGE TOOR: In that case you are in contempt of court, put him in there and we'll speak at one o'clock. Under shackles.
>
> MR. DUCKMAN: Judge, I think, I'd like an opportunity to be represented by counsel.
>
> JUDGE TOOR: Mr. Duckman, I've just found you in summary contempt by ignoring the court's orders.
>
> MR. DUCKMAN: It may well be an order that the court shouldn't have given me.
>
> JUDGE TOOR: Excuse me. If you continue talking while I am speaking, I will hold you overnight, do you understand. I am holding you till one o'clock. I find that you are in contempt by ignoring my orders. We will see you at one.

App. 3-4 n.3. The time, according to the videotape, was 12:17 p.m.

Judge Toor then left the bench and Mr. Duckman was escorted (though without the shackles which the court had specified, which the court officer deemed unnecessary) to the court lockup, where he remained in a cell until 1:00.

The hearing resumed briefly after a lunch break, at which time the judge "requested" that petitioner speak with Mr. Barrows about "what his wishes are about proceeding," and report back to the court. Petitioner advised the judge that he would be seeking counsel on his own behalf and did not feel able to proceed. The court reset the matter for later that week.

In a written order filed the next day certifying her action, as required by Vermont Rule of Criminal Procedure 42(a),[2] Judge Toor wrote that she had been "extremely patient" with petitioner's behavior on past occasions, "but this conduct cannot continue." App. 40-41.

The October 20, 2004 Order Denying Petitioner's Motion to Vacate

On September 9, 2004 petitioner, through counsel, filed a motion to vacate the contempt order on a number of substantive and procedural grounds.[3] Among other claims petitioner argued that the judge had exceeded the limited

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[2] Vt. R. Crim. Pro. 42 sets forth the procedures for summary and nonsummary contempt. Rule 42(a) provides,

> A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

[3] Substantively petitioner argued that the court's insistence on hearing Mr. Barrows' allocution before announcing its acceptance of the plea agreement violated the state law governing change-of-plea proceedings, Vt. R. Crim. Pro. 11, and jeopardized Barrows' constitutional right against self-incrimination. He also maintained that the videotape of the hearing contradicted the court's finding that he acted in a disrespectful manner. Petitioner does not seek certiorari on either of these grounds.

power of summary contempt because his refusal to consult with Barrows had not disrupted the proceedings or prevented the performance of a judicial duty. Because the vague reference to petitioner's allegedly inappropriate behavior on previous occasions suggested that the judge had become personally embroiled in a running battle with petitioner, he argued that she was required to disqualify herself as a matter of due process. Counsel requested an evidentiary hearing. Motions to file additional memoranda as *amici curiae* were filed by the Vermont Association of Criminal Defense Lawyers and the Vermont Defender General's Office.

On October 20, 2004, Judge Toor handed down a 21-page opinion, App. 42, denying appellant's request for a hearing, denying the two *amicus* motions, and rejecting appellant's legal challenges to her summary contempt order. The judge wrote that she regretted her order that Mr. Duckman be removed from the courtroom "under shackles," but staunchly defended the contempt order itself and the sentence to the lockup.

Often in strong and pointed language, the judge chastised petitioner for his behavior over an extended but unspecified time. She had never in her career "seen an attorney behave in as disrespectful and angry a manner towards a judge as Attorney Duckman has on repeated occasions, both in the courtroom and in chambers." App. 43.

She had chosen not to specify these past "behaviors" in her August 31 order, "so as not to embarrass [petitioner] publicly[,]" but decided to do so "given his failure to acknowledge that his behavior was in any way inappropriate, and given the filing of this motion to vacate. . . ." App.

44-45. She proceeded to specify "some of" petitioner's "prior inappropriate conduct[,]" alleging a variety of misdeeds, including dress code violations, tardiness, shouting at the court manager (apparently not in the judge's presence), "rudely accusing the court of valuing punctuality too much and justice not enough," and "repeatedly arguing with the judge after she had ruled against him. . . ." App. 45-46.

These incidents, the judge wrote, "were not the basis for the contempt finding, but they contributed to the court's decision that there was no less severe action that would adequately address the situation. They also contributed to the court's decision to impose the sanction that it chose, rather than a monetary sanction." App. 46. As the court explained in its conclusion,

> If the conduct on August 30 had been the first incident of oppositional and disrespectful behavior by Attorney Duckman, the court likely would not have taken the action it did. Generally, the court seeks to speak at the bench or in chambers with attorneys about any issues with their courtroom behavior. With another attorney, that would have been the likely course of action. Here, however, the prior history with Attorney Duckman had made it clear that lesser steps would be ineffective.

App. 66.

Contempt and imprisonment were necessary, in part because petitioner's conduct violated a direct order of the court and "forced the courtroom proceedings to come to a halt[,]" App. 44, but also for purposes of deterrence and reform, *i.e.*, "to deter similar future behavior by [petitioner],

and to make clear to others that such behavior would not be tolerated." *Ibid.*

> [T]he court had been faced over a period of months with repeated challenges to its authority, displays of anger, and other unprofessional conduct by Attorney Duckman. The court had taken the following steps to address the problems prior to this incident: speaking privately with Attorney Duckman; calling one of his superiors at the Defender General's Office to ask that they take action; having the Court Manager report to Respondent's superiors the incident in which he shouted at the Court Manager; making the court's expectations clear from the bench, on the record, in the courtroom; and advising Respondent previously that he was at risk of being held in contempt. Thus, Counsel was well aware of the court's expectations, and *kinder and gentler efforts to modify his behavior had been unsuccessful.*

App. 66 (emphasis added).

Proceedings in the Vermont Supreme Court

Petitioner appealed both the summary contempt order itself, as well as the denial of the motion to vacate, to the Vermont Supreme Court, arguing the same claims he had raised in his motion, and additional arguments based on the judge's opinion.

Regarding Judge Toor's itemization of, and reliance on, his alleged prior professional misconduct, petitioner specifically disputed each of Judge Toor's charges against him, and elaborated his argument that the judge had become personally involved in an embittered controversy

with him over the course of their year together in the Addison court.

With reference to the judge's assertion of a deterrent and behavior-modification justification, counsel argued that she had far exceeded the narrow purposes of summary contempt, trenching on functions reserved to the state's Professional Conduct Board. Furthermore, because she predicated these justifications on factual assertions which petitioner had no opportunity to contest, she had done so in violation of his right to procedural due process.

The Vermont Supreme Court affirmed by a 4-1 vote on March 10, 2006. Without deciding whether Judge Toor's conduct of the *Barrows* hearing violated the plea-taking procedures of Vt. R. Cr. P. 11, or if she could lawfully require petitioner to consult with his client about the pros and cons of going forward with the plea agreement, the majority held that petitioner had no right to disobey the court's order.[4]

The majority rejected petitioner's argument that the judge should have recused herself. Acknowledging the due

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[4] The majority held that petitioner was bound to comply with the judge's order regardless of its lawfulness by the "collateral bar rule," which "provides that individuals cannot challenge the validity of a court order by violating the order." App. 9-10, citing, among other authorities, *Maness v. Meyers*, 419 U.S. 449, 458 (1975). The exceptions to the rule, excusing compliance in circumstances which allow no adequate or effective remedy other than non-compliance, did not apply to this case, the court held. In particular, the exception spelled out in *Maness*, where "the attorney believes in good faith that obedience might implicate his client's Fifth Amendment rights[,]" did not justify petitioner's refusal to consult with his client as directed. App. 11-14.

As noted, petitioner does not ask this Court to review these holdings.

process rule requiring judges to disqualify themselves "if they are personally embroiled in disputes with the litigant or lawyer accused of contempt[,]" App. 20, citing *Offutt v. United States*, 348 U.S. 11 (1954), the majority found the rule inapplicable to "instant" contempt rulings. Except in cases of extreme personal hostility, the *Offutt* rule, the court held, "is not applicable if the judge is acting under Rule 42(a) 'the instant the contempt is committed,' *Mayberry* [*v. Pennsylvania*], 400 U.S. [455] at 463, out of necessity to prevent obstruction of a proceeding." The option of such "instant" action, the court reasoned, was especially important "in small states like Vermont, where immediate action by another judge is usually impossible; as such, summary contempt adjudication in such states would also therefore be impossible." App. 20-21.

The court did not address petitioner's argument that the circumstances of the case did not even arguably prevent the performance of a judicial duty, and presented no necessity for summary action or, *a fortiori*, for "instant" punishment.

Alternatively, the court held that Judge Toor need not have disqualified herself even if she had deferred action until the end of the hearing, distinguishing the claimed bias from inevitable "context":

> Even if the *Offutt* standard applied, we cannot conclude on this record that Judge Toor should have been disqualified. Judge Toor was sitting in a county where one judge covers all courts: civil, criminal, and family. She was at the

> end of a six-month rotation.[5] Criminal defense for the indigent is provided by a statewide public defender system. 13 Vt. Stat. Ann. §§ 5201-5277. Attorney was a public defender for the county. In this role, he was appearing regularly before Judge Toor. Inevitably, in that extensive interaction, each had views about how the other handled cases, both generally and in specific instances.
>
> As attorney himself has stressed in his brief, we want contempt citations to be used sparingly and in narrow circumstances. Thus, to the extent a judge has concerns about the behavior of a lawyer who is appearing regularly in the judge's court, we want the judge to find an outlet for those concerns short of contempt. In the ruling on the motion to vacate the contempt order, Judge Toor detailed the actions she had taken in the past to correct attorney's behavior.

App. 21-22.

Apparently by the same token the court rejected petitioner's argument that he could not be denied an opportunity to contest Judge Toor's charges against him:

> We recognize that attorney vigorously disputes that he had behaved inappropriately in the past. . . . But this difference over professional conduct does not mean that the judge had developed personal animus against attorney.

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[5] This is a factual error. As the court judicially noticed, the assignment was for one year.

App. 22. Judge Toor's opinion on the motion to vacate did not show "that the contempt citation was made to punish attorney's past behavior." App. 24.

The court generally ignored petitioner's argument regarding Judge Toor's stated reform and deterrent purposes for holding him in contempt and ordering him to the lockup. The court responded to that argument as follows:

> In a separate argument, attorney claims that the court misused criminal contempt as a behavior modification tool, made necessary because "kinder and gentler efforts to modify his behavior had been unsuccessful." While the judge used those words in the ruling on the motion to vacate, there is no indication that the judge attempted to lead attorney into contemptuous behavior in order to sanction.

App. 23 n.7. As for the sentence itself, the court wrote, "the sanction chosen is a criminal sentence that reflects the crime committed as well the circumstances and record of the person before the court." App. 25.

A dissenting opinion protested that the majority had upheld a criminal sentence which was based, in significant part, on factual assertions which petitioner had never been able to contest.

> To my knowledge, this is the first time in Vermont that an attorney has been criminally convicted and held in jail for efforts to protect a client's rights. This is of even greater concern given that attorney in this case never had the opportunity for a hearing. Rather, he was subject to a criminal conviction and yet received less due process than someone who is charged with a

> noise complaint or a speeding ticket. While the trial judge must have the power to maintain order and preserve respect for the institution of the court, this cannot be done at the expense of procedural fairness.

App. 29.

Petitioner moved for reargument on the ground that the majority's approval of *ex parte* "context" as a legitimate basis for summary contempt was unprecedented and violated due process. The court denied the motion without further opinion on April 26, 2006, App. 69, and this petition is timely filed within ninety days of that ruling.

REASONS FOR GRANTING CERTIORARI

I. Review Is Warranted Because the Vermont Supreme Court Has Decided Important Federal Questions Concerning the Disqualification of Judges in Summary Contempt Cases That Have Not Been, but Should Be, Settled by this Court

The case raises two issues regarding the disqualification of judges in summary criminal contempt cases, issues which the Court has addressed in previous opinions but in a context, and with a twist, which the Court's precedents do not answer.

A. Legitimate Long-term "Context" vs. Disqualifying "Embroilment"

A line of decisions has made clear that, at least as a general matter, judges who have become personally involved in a running controversy with an attorney should

refer their charges of contempt to another judge. In *Taylor v. Hayes*, 418 U.S. 488, 501-502 (1974) the Court wrote that the judge, in the course of a contentious trial, had

> become embroiled in a running controversy with petitioner. Moreover, as the trial progressed, there was a mounting display of an unfavorable personal attitude toward petitioner, his ability, and his motives, sufficiently so that the contempt at issue should have been finally adjudicated by another judge.

To the same effect, see *Mayberry v. Pennsylvania* 400 U.S. 455, 464-465 (1971); *Offutt v. United States*, 348 U.S. 11 (1954); *Sacher v. United States*, 343 U.S. 1, 30 (1952) (Frankfurter J., dissenting).

But in all the cases where the issue has come up the "running controversy" and the culminating contempt were confined to a single proceeding. In this case, by contrast, the controversy between Judge Toor and petitioner extended over the course of many months, surfacing in other cases and interactions outside the courtroom (and outside the judge's presence). The Vermont court, acknowledging the influence of these prior incidents on the judge's decision to hold petitioner in contempt, deemed it to be wholly legitimate "context" for the judge's discretionary summary contempt ruling rather than cause for disqualification.

This Court has not previously considered a contempt-disqualification issue of this stripe, although the situation which gave rise to it – a long-term relationship between a public defender and a judge in daily contact with each other over a long period, is now standard in many courts nationwide.

Petitioner contends that this sort of running battle should be treated no differently from those which evolve over the course of a single trial. Lower court cases have generally taken this position. See e.g. *Sandstrom v. Butterworth*, 738 F.2d 1200 (11th Cir. 1984) (vacating contempt order against lawyer by a state court judge with "a pre-existing and very strongly held dislike" against him); cf. *Dooley v. District Court*, 811 P.2d 809 (Col. en banc, 1991) (in addition to triggering conduct judge recited other complaints, such as "resisting the court's legitimate desire to manage its cases," "filing legally insupportable briefs," tardy filing of motions, etc.) From the standpoint of judicial fairness and neutrality, there is no reason to legitimize such long-term antagonisms as mere "context," judges being human, *Offutt*, 348 U.S. at 14, and revenge being a dish which is best served cold.

It is true, as the Vermont court noted, that "there will always be a context for a contempt sanction," App. 25, but judges are expected to set such influences aside and "'hold the balance nice, clear, and true between the state and the accused. . . .'" *Taylor v. Hayes*, 418 U.S. at 501, quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1972). It is clear from the tenor of Judge Toor's opinion denying the motion to vacate, and her candid concession that petitioner's prior alleged misconduct contributed to both her contempt ruling and her prison sentence, that she failed to do so.

B. Disqualification and "Instant" Punishment

The Vermont court's alternative holding – that Judge Toor had no duty to disqualify herself because she held petitioner in contempt and ordered his imprisonment "instantly" and her action therefore fell within an exception to

the *Offutt* rule, App. 20-21 – also raises an important federal question.

This Court's decisions have identified two classes of summary contempt, those where the judge waits until the end of the proceeding before acting, and those where he or she acts "the instant the contempt is committed. . . ." *Mayberry*, 400 U.S. at 463-464; *Sacher*, 343 U.S. at 9-10. In the latter situation, disqualification is generally not required, even if the judge has become embroiled in an otherwise disqualifying controversy with the attorney: the "exception" to the *Offutt* rule to which the Vermont court referred. Lower courts have seen an exception to this exception in cases where "the reviewing court forms a definite and firm conviction that the presiding judge harbored . . . bias towards the contemnor [that would] prevent the fair administration of justice. . . ." *In re Levine*, 27 F.3d 594, 598 (D.C. Cir. 1994), quoting *Sandstrom v. Butterworth*, 738 F.2d at 1214.

The record readily supports such a determination here, given the vehemence of Judge Toor's opinion and the timing of her contempt order, on the last Monday of her year in the Addison court. But petitioner also suggests an alternative limitation: that the "instant" punishment allowing the exception must be justified and necessary to the traditional goals of summary contempt. In its review of federal contempt cases the Court has been guided by the principle that the contempt power, and in particular summary contempt, should be confined to "the least possible power adequate to prevent actual obstruction of justice. . . ." *Pounders v. Watson*, 521 U.S. 982, 993 (1997) (Stevens, J., dissenting), quoting *In re McConnell*, 370 U.S. 230, 236 (1962). In *Pounders* the Court referred to the "least possible power" rule as an "equitable principle" in federal cases. *Id.* 990. In

In re Michael, 326 U.S. 224, 225 (1945), however, and again in *McConnell*, at 234, the Court saw it as a corollary of the procedural safeguards which summary contempt can lawfully dispense with, in that "any broader contempt power than this would permit too great inroads on the procedural safeguards of the Bill of Rights." Petitioner argues that the "least possible power" rule should govern state summary contempts as a matter of due process, and that it should limit the power of an otherwise disqualified judge to inflict instant punishment.

There was absolutely no necessity for instant action in this case. Unlike some contemnors petitioner was not guilty of insulting or outrageous behavior; the worst the Vermont court could say of his demeanor, after reviewing the videotape, was that he was upset and angry and seemed "defiant." App. 16. Instant imprisonment, as opposed to a simple citation for contempt, to be adjudicated later, served no dignitary values.

Nor did petitioner's refusal to consult with his client obstruct the proceedings, in a manner requiring instant imprisonment, because the court itself had full authority to advise Mr. Barrows about the pros and cons of proceeding with the plea agreement that day and to "hear it from him," as she insisted. App. 3 n.3.

Vt. R. Crim. Pro. 11(e)(4) provides:

> If the court rejects the plea agreement or defers decision upon it, the court shall . . . advise the defendant personally in open court that the court is or may not be bound by the plea agreement . . . and . . . that if he persists in his plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

This is exactly the same ground which the judge ordered petitioner to cover. Alternatively, the court could have done what the rules also permit – ordered a presentence investigation report and continued the matter. Rule 11(e)(2) allows the Court to "defer its decision as to acceptance or rejection" pending preparation of a presentence report. Indeed, if the judge was bent on deferring her decision until she knew what the defendant had to say, ordering a presentence report was her only lawful option.

Finally, the court could have simply recessed for lunch (as it did *after* ordering petitioner to the lockup), or granted petitioner's request for a continuance (as it did after the lunch break). This was not a trial, whose interruption would jeopardize the proceedings; the court certainly had other matters to attend to that day; and there was no legal or practical imperative that the *Barrows* case be concluded that day. Compare *Harris v. United States*, 382 U.S. 162 (1968) (grand jury witness who refused to testify after being granted immunity could not be summarily held in contempt because there was no need for immediate action) with *United States v. Wilson*, 421 U.S. 309 (1975) (reaching the opposite conclusion for a trial witness who refused to testify, distinguishing *Harris* on the ground that a grand jury can easily suspend proceedings and turn to other matters, while "[i]n a trial, the court, the parties, witnesses, and jurors are assembled in the expectation that it will proceed as scheduled.")

II. Review Is Warranted Because the Vermont Court's Affirmance of a Summary Contempt Order Motivated by Facts Outside the Current Proceeding, and Justified by the Goals of Reforming the Contemnor and Deterring Future Misconduct, Conflicts with Decisions of This and Other Courts

Two fixed stars of this Court's summary contempt jurisprudence are the Court's insistence that summary contempt be based only on conduct occurring before the judge, in open court, and that summary contempt's justifying purpose be narrowly confined its justifying purpose, the "vindication of the court's dignity and authority. . . ." *Pounders v. Watson*, 521 U.S. at 988. The Vermont court's decision contradicts both these axioms and as such it threatens a wholly unprecedented expansion of the courts' summary contempt powers. Applied to defense counsel in criminal cases it raises the same concern which the Court saw in *Maness v. Meyers*, 419 U.S. at 466, "that some advocates may lose their zeal for forthrightness and independence."

With one exception, all this Court's previous summary contempt cases have been confined to conduct occurring in the course of the same proceeding in which the contempt order was issued. If there was a "context" for the ruling it consisted of earlier similar misconduct in the same case. See e.g. *Pounders*, 521 U.S. at 983-985 (contempt after several unheeded warnings to avoid subject of sentencing in questioning witnesses); *Taylor v. Hayes*, 418 U.S. at 490-491 (1974) (nine charges of contempt in a single trial); *Mayberry v. Pennsylvania*, 400 U.S. 455 (pro se defendant repeatedly insulted judge throughout trial); *In re McConnell*, 370 U.S. at 232-233 (repeated questioning on banned

subject); *Sacher v. United States*, 343 U.S. at 9 ("counsel repeatedly were warned" during lengthy trial); *Offutt v. United States*, 348 U.S. 11 (1954) (twelve contempts in course of trial). See also *Ungar v. Sarafite*, 376 U.S. 575 (1964) (nonsummary contempt against attorney-witness who repeatedly refused to give responsive answers).

The exception is *Cooke v. United States*, 267 U.S. 517 (1925). The lawyer in *Cooke* had written a letter to the trial judge which the judge found insulting. The Supreme Court agreed it was contumacious. *Id.* 534. When announcing his contempt order, however, the judge recited a series of other perceived misdeeds on the attorney's part, concluding, "Your whole course, as I say, has been contemptible, not only in this matter. . . ." The judge denied the lawyer an opportunity to answer these additional charges (as Judge Toor did in this case) and this Court reversed.

> [W]hen the court came to pronounce sentence, it commented on the conduct of both the petitioner and his client in making scandalous charges in the pleadings against officials of the court and charges of a corrupt conspiracy against the trustee and referee in bankruptcy, and in employing a detective to shadow jurymen while in charge of the marshal, and afterwards to detect bribery of them, in proof of which the court referred to a sworn statement of the detective in its hands, which had not been submitted to the petitioner or his client. When Walker questioned this, the court directed the marshal to prevent further interruption. It was quite clear that the court considered the facts thus announced as in aggravation of the contempt. Yet no opportunity had been given to the contemnors even to hear these new charges of the court, much less to meet

> or explain them, before the sentence. We think the procedure pursued was unfair and oppressive to the petitioner.

Id. 538.

Lower court cases have also disapproved the influence of the sort of "context" which the Vermont court sanctioned – uncharged contempts and other run-ins unrelated to the current case. See *Sandstrom v. Butterworth*, 738 F.2d 1200 (judge said he had put up with attorney's antics for ten years – held evidence of bias); *Dooley v. District Court*, 811 P.2d at 811 (in addition to charged contempt, judge referred to lawyer's "practices of 'resisting the court's legitimate desire to manage its cases,' sending the less experienced [associate] to 'fill-in when he wants to slow things down,' filing legally insupportable briefs, and filing important motions on the eve of trial.") Compare *United States v. Briscoe*, 839 F.Supp. 36, 38 (D.D.C. 1992), where the court held defense counsel in contempt for repeated refusals to comply with rulings during a trial, but was careful to "dispel any notion that its decision [was] affected by prior proceedings in a separate matter" involving conflict between the same judge and the lawyer's client. *Id.* n.1. Counsel has found no cases going the other way on this point.

The Vermont court attempted to bring this case within the rule by stressing that petitioner's actions in the *Barrows* case formed the "basis" for the contempt order, although his alleged misconduct on other occasions concededly "contributed to" the judge's discretionary decision to hold him in contempt, as well as her decision that jail was the necessary and appropriate punishment.

This Court should make clear that its holding in *Cooke*, and its dicta in other cases, extend to a trial judge's decision to punish with summary contempt, as well as to the formal "basis" of that contempt. If previous perceived offenses are a permissible motivation for summary contempt and imprisonment, some lawyers will be closer to contempt than others each time they step into the courtroom. Because the context builds only in the judge's mind, or private notes, the lawyer will generally not know its nature, whether it is based on misperceptions, what conduct or speech the judge will take amiss, or, in general, how thin the ice is. This is a formula for stilted and circumspect relations between judges and lawyers, and for timid, risk-averse advocacy.

Justice Frankfurter wrote in *Offutt*, 348 U.S. at 14:

> The pith of this rather extraordinary power to punish without the formalities required by the Bill of Rights for the prosecution of federal crimes generally, is that the necessities of the administration of justice require such summary dealing with obstructions to it. It is a mode of vindicating the majesty of the law, in its active manifestation, against obstruction and outrage.

Although the formulations differ, the Court has never wavered from the principle that extraordinary power of summary contempt stems from, and must be confined to, the need for judicial self-protection. See e.g. *Harris v. United States*, 382 U.S. at 164 ("acts threatening the judge or disrupting a hearing or obstructing court proceedings"); *In re McConnell*, 370 U.S. at 234 ("An obstruction to the performance of judicial duty resulting from an act done in the presence of the court"); *Ex parte Hudgings*, 249 U.S.

378, 383 (1919) (the "great and only purpose" of summary contempt "is to secure judicial authority from *obstruction in the performance of its duties.*")

Judge Toor's reasons were entirely different. Contempt and imprisonment were necessary, she wrote, because past efforts to correct objectionable conduct had failed to eliminate perceived "challenges to [the court's] authority" and a variety of "other unprofessional conduct" over a period of months, and "kinder and gentler efforts to modify his behavior had been unsuccessful." App. 65-66.

The target of summary contempt is actions, not actors, and the necessity warranting immediate punishment is judicial self-protection, not attorney discipline or behavior modification. Professional misconduct, of the sort which Judge Toor cites against petitioner, is the job of disciplinary committees and professional conduct boards, which have the broad mandate to entertain complaints; detailed procedures for charging, hearing and determining alleged violations; carefully crafted procedural protections; strict confidentiality safeguards; and specific sanctioning authority. Vermont's procedures are no different from those of other jurisdictions in this regard. See generally Vt. Admin. Order 9, Permanent Rules Governing Establishment and Operation of the Professional Responsibility Program.

In the absence of such or similar protections, summary contempt's goal of "vindicating the majesty of the law" can not extend to such matters consistently with the attorney's right to due process of law.

III. By Approving Summary Punishment of an Attorney for Alleged Professional Misconduct, Without a Hearing or Opportunity to Contest, the Vermont Court's Decision Conflicts with Decisions of this and Other Courts

If the "basis" of Judge Toor's summary contempt order (as opposed to its motivation) was petitioner's refusal to consult with Mr. Barrows as ordered, her decision to punish petitioner with the humiliation of incarceration was concededly based on his prior conduct, or her disputed view of it. The Vermont Supreme Court found nothing wrong with this. Criminal contempt is a crime, the court reasoned, and "the sanction chosen is a criminal sentence that reflects the crime committed as well as the circumstances and record of the person before the court." App. 25. "[T]he court appropriately considered attorney's prior behavior in determining its sentence for contempt." App. 28.

The decision flies in the face of settled Constitutional law. In a summary contempt case which does not involve past conduct, no process is required because all the facts have occurred in open court in the judge's presence. *Pounders v. Watson*, 521 U.S. at 498. That rationale can not justify a sentence here based on disputed allegations of misconduct in the uncertain past, some which did not even involve the judge directly. Absent that unique justification petitioner was entitled, under the most fundamental due process guarantee, to "an opportunity to be heard" on the factual basis for imprisonment. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: July 24, 2006

Respectfully submitted,

WILLIAM A. NELSON
52 High Street
Middlebury, VT 05753
802-388-6781
Counsel for Petitioner

In re Appeal of Lorin Duckman

No. 2004-483

SUPREME COURT OF VERMONT

2006 VT 23; 898 A.2d 734

March 10, 2006, Filed

COUNSEL: William A. Nelson, Middlebury, for Appellant.

William H. Sorrell, Attorney General, and John Treadwell, Assistant Attorney General, Montpelier, for Appellee.

John L. Pacht of Hoff, Curtis, Pacht, Cassidy, Frame, Somers & Katims, P.C., Burlington, for Amicus Curiae Vermont Association of Criminal Defense Lawyers.

Matthew F. Valerio, Defender General and Anna Saxman, Deputy Defender General, Montpelier, for Amicus Curiae Office of the Defender General.

PRESENT: Dooley and Johnson, JJ., and Eaton, D.J., Gibson, J. (Ret.), and Martin, Supr. J. (Ret.), Specially Assigned. EATON, D.J., dissenting.

[*P1] DOOLEY, J. Attorney Lorin Duckman appeals a district court order finding him in summary criminal contempt and placing him in custody for forty-five minutes. On appeal, attorney makes numerous claims regarding the court's contempt order and subsequent denial of his motion to vacate. Generally, these claims can be summarized as follows: (1) attorney was justified in disobeying the court's order because the court did not have the authority to issue the order, and an exception to the collateral bar rule applies; (2) the court's contempt order was based on erroneous factual findings; (3) attorney was denied his due process guarantees of notice, a hearing, and

an impartial tribunal; and (4) the sentence was beyond the court's discretion. We reject all of these claims and affirm the rulings of the district court.

[*P2] The events forming the basis for the contempt finding occurred on August 30, 2004, when attorney was in Addison District Court representing the defendant in the criminal trial of State v. Barrows, Nos. 163-3-03, 602-10-03, and 240-6-04 Ancr. The parties presented the court, Judge Helen M. Toor presiding, with a written plea agreement. At the time, the plea agreement included the proposed sentence, except for the element of restitution, which the parties were still negotiating. The parties discussed restitution and the defendant's ability to pay with the court. The victim did not support the plea agreement and gave an unsworn statement to that effect.

[*P3] Before ruling on acceptance of the plea agreement, the court turned to the defendant to conduct a Rule 11 colloquy[1] and allow the defendant a chance to speak. Attorney objected, and asked that the court rule on whether the plea agreement would be accepted before addressing his client. The court declined to change its procedure, and attorney stated that he would then be forced to withdraw his client's plea.[2]

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[1] Before accepting a guilty plea, the court must personally address the defendant in open court and inform him of certain rights, including the consequences of a guilty plea. V.R.Cr.P. 11(c).

[2] Although the discussion in the courtroom revolved around whether or not attorney's client would withdraw his plea, the real issue was whether the client would withdraw from the agreement, as no plea had yet been taken. The court began by addressing the client:

> THE COURT: All right, Mr. Barrows, I'm going to go over this with you and then I'm going to hear whatever you have

(Continued on following page)

[*P4] The court explained that attorney had no independent authority to withdraw his client's plea and must first consult with his client. Attorney refused to adjourn and consult with his client and claimed that the court was interfering with his attorney-client relationship. The court ordered attorney to leave and speak with his client. When attorney refused, the court found him in contempt for expressly refusing to comply with the court's order and directed a court officer to place him in a holding cell until 1:00 p.m., which was approximately 45 minutes later.[3]

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to say and I'm going to make a decision at that point about whether I'm going to accept this proposal or not. All right?

MR. DUCKMAN: Judge, I would prefer that you make the decision before he makes any admissions.

THE COURT: Well, I'm not going to because I want to hear what he has to say to me in his allocution.

MR. DUCKMAN: But then we don't have a . . .

THE COURT: That's my view.

MR. DUCKMAN: But then we don't have an agreement.

THE COURT: That's correct and that's the way it works.

MR. DUCKMAN: Okay, well, then we're not going to go forward.

THE COURT: Then you can withdraw the plea. Anything he said is no longer . . .

MR. DUCKMAN: No, I don't agree with that. I think that if you have an agreed-upon sentence.

THE COURT: Mr. Duckman, that's how it always works.

MR. DUCKMAN: But I, but I . . .

THE COURT: I take the plea, I hear what everybody has to say, I decide. One of the things I take into account is what your client has to say about his responsibility, that's one of the issues that a judge always takes into account.

[3] The exchange proceeded as follows:

THE COURT: Well, Mr. Duckman, hold on. I think you need to consult with your client. I don't think you have the

(Continued on following page)

right to now withdraw his plea without consulting with him. And I'm sure . . .

MR. DUCKMAN: I think you're interfering with my relationship with him right now, Judge. I'm withdrawing . . .

THE COURT: Well, I'm going to ask you – stop.

MR. DUCKMAN: Okay.

THE COURT: Or I will hold you in contempt of court.

MR. DUCKMAN: I haven't done anything contemptuous.

THE COURT: Stop. Stop. I don't think it's an appropriate thing for a lawyer to withdraw a client's plea without discussing it with the client, the pros and cons, the costs and benefits. You did this once before, I didn't say anything about it. I do not think it's appropriate. I think you need to consult with your client about the risks of going to trial if he does that. If after you've spoken with him, he comes in and tells me he wishes to not go forward, I will accept that, but I need to hear it from him, okay?

MR. DUCKMAN: I think, Judge, what you're doing is interfering with my relationship with my client.

THE COURT: You can . . .

MR. DUCKMAN: I would ask for, I would ask for a continuance right now so I can prepare appropriate papers and perhaps I will come back and ask for a change of venue. But I don't think that I am prepared to proceed.

THE COURT: Well, I'm not accepting that request. So why don't you go out . . .

MR. DUCKMAN: Well, I'd ask for a continuance.

THE COURT: No.

MR. DUCKMAN: And I think it's inappropriate.

THE COURT: Go speak with your client.

MR. DUCKMAN: I think it's inappropriate to threaten me with contempt.

THE COURT: Stop. Mr. Duckman, I've told you what to do. Go speak with your client. I will be available in ten minutes once you've talked to him.

MR. DUCKMAN: Judge, I don't think you can tell me to go talk to my client.

(Continued on following page)

[*P5] In a written order, the court certified the contempt finding on August 31, 2004, stating that attorney's "direct refusal of the court's order, along with [his] angry, confrontational, and disrespectful manner . . . made it impossible to proceed with the case, evidenced an utterly inappropriate manner for a lawyer to use in the courtroom towards a judge, and constituted contempt of court." On September 9, 2004, attorney filed a motion to vacate the contempt order, arguing that it was invalid on several grounds. Attorney also requested an evidentiary hearing to present his own version of the facts. On October 20, 2004, the court denied attorney's request for a hearing, finding that it was unnecessary because the contemptuous conduct took place in the court's presence.

[*P6] The ruling on the motion to vacate was extensive and addressed each of attorney's claims at length. The introduction set the stage:

THE COURT: Well, I just did.

MR. DUCKMAN: But I'm not going to go do it.

THE COURT: In that case, you are in contempt of court, put him in there and we'll speak at one o'clock, under shackles.

MR. DUCKMAN: Judge, I think I'd like an opportunity to be represented by counsel.

THE COURT: Mr. Duckman, I've just found you in summary contempt by ignoring the Court's orders.

MR. DUCKMAN: It may well be an order that the Court shouldn't have given me.

THE COURT: Excuse me. If you continue talking when I am speaking, I will hold you overnight, do you understand. I am holding you until one o'clock. I find that you are in contempt by ignoring my orders. We will see you at one.

The undersigned has never in twenty-two years in the legal profession . . . seen an attorney behave in as disrespectful and angry a manner towards a judge as Attorney Duckman has on repeated occasions, both in the courtroom and in chambers. Prior to August 30, 2004, the court had attempted to address Respondent's behaviors by, for example, speaking to Respondent in chambers, asking one of his superiors to speak to him, and clearly explaining the court's expectations of him. He and his superior were also advised that if such conduct continued the court would be forced to take more serious action. On at least one prior occasion, Respondent was warned that he was on the verge of being held in contempt.

On August 30, not only did Respondent display the same rude and disrespectful behavior that he had displayed on previous occasions – repeatedly interrupting the judge – but he went further than he had in the past. On this occasion, he willfully refused to comply with a direct order of the court intended to protect his client's right to determine whether to proceed with a guilty plea pursuant to a proffered plea agreement, or whether to withdraw from that agreement. Moreover, Respondent's refusal forced the courtroom proceedings to come to a halt. Because of this direct refusal to comply with the court's order, as well as the disrespectful way in which it was done and its interference with the ongoing proceeding, the court concluded that it had no choice but to take immediate action. Such action was needed to punish the behavior, to deter similar future behavior by Respondent, and to make clear to others that such behavior would not be tol[illegible]ated. Because Attorney Duckman's actions

> demonstrated that repeated prior attempts to remedy his behavior had been unsuccessful, the court also concluded that a severe sanction was necessary. For all of these reasons, the court imposed the sanction of a brief incarceration until after the lunch hour.

The introduction was followed by a section entitled "Past Inappropriate Conduct," which provided "a brief summary of some of the prior instances of unprofessional conduct." The court explained the influence of these prior acts:

> These incidents were not the basis for the contempt finding, but they contributed to the court's decision that there was no less severe action that would adequately address the situation. They also contributed to the court's decision to impose the sanction it chose, rather than a monetary sanction.

The court then went on to describe the events that led up to the contempt finding. The court reiterated the reasons stated in the August order: "The court's finding of contempt was based upon the willful refusal of counsel to comply with a clear order of the court, as well as the 'angry, confrontational, and disrespectful manner' in which he did so." The court analyzed the grounds necessary for an adjudication of contempt and held that they were present. The court concluded:

> As noted above, the court had been faced over a period of months with repeated challenges to its authority, displays of anger, and other unprofessional conduct by Attorney Duckman. . . . Counsel was well aware of the court's expectations, and kinder and gentler efforts to modify his behavior had been unsuccessful.

> If the conduct on August 30 had been the first incident of oppositional and disrespectful behavior by Attorney Duckman, the court likely would not have taken the action it did. Generally, the court seeks to speak at the bench or in chambers with attorneys about any issues with their courtroom behavior. With another attorney, that would have been the likely course of action. Here, however, the prior history with Attorney Duckman had made it clear that lesser steps would be ineffective. Given the interruption of the proceedings, the willful and disrespectful nature of the conduct, and the court's past experience with the attorney in question, it was apparent that a severe sanction was necessary to convey the message that such behavior was unacceptable.

[*P7] Under our procedural rules:

> A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

V.R.Cr.P. 42(a). Although this rule provides the procedure for adjudicating a criminal contempt, common law dictates the substantive elements of summary contempt. State v. Allen, 145 Vt. 593, 600, 496 A.2d 168, 172 (1985). Summary contempt is "an act 'committed directly against the authority of the court, tending to impede or interrupt its proceedings or lessen its dignity.'" Id. (quoting In re Morse, 98 Vt. 85, 90, 126 A. 550, 551 (1924)) (emphasis omitted). Trial courts have discretion to issue contempt orders, and reversal of a contempt judgment is appropriate only if "the trial court's discretion was either totally withheld or

exercised on grounds clearly untenable or unreasonable." Id. We review the exercise of this discretion carefully in cases of summary contempt because in those proceedings "the otherwise inconsistent functions of prosecutor, jury and judge are united in one individual." United States v. Flynt, 756 F.2d 1352, 1363 (9th Cir. 1985). Therefore, we view the decision to use summary contempt power "as an extraordinary exercise to be undertaken only after careful consideration and with good reason." Id. We are also mindful that the power of summary contempt is necessary to "preserve order and decorum" in the courtroom. Sacher v. United States, 343 U.S. 1, 21, 72 S. Ct. 451, 96 L. Ed. 717 (1952).

I.

[*P8] We first address attorney's claim that the court had no authority to order him to speak with his client, so he was justified in disobeying its order. Attorney attacks the validity of the ruling on several grounds, including that: (1) the court's plea process did not comply with the requirements of Vermont Rules of Criminal Procedure 11 and 32; (2) requiring his client to speak before acceptance of the plea agreement would violate his client's right against self-incrimination; (3) if his client spoke he could be subject to prosecution for perjury later; and (4) his client would risk a harsher sentence if he spoke before acceptance of the agreement. The State maintains that the court complied with the requirements of Rules 11 and 32, and additionally submits that the collateral bar rule precludes challenging the validity of the court's order by engaging in contemptuous conduct. We do not reach attorney's substantive arguments because we conclude that the collateral bar rule prevents attorney from challenging the validity

of the court's order as a defense to the judgment of contempt.

[*P9] We reemphasize at the outset the grounds for finding attorney in contempt. He was not found in contempt for refusing to go along with the court's plea consideration procedure. Obviously, his opposition to the procedure was the context that led to the contempt judgment; it was not, however, the reason for that judgment. Instead, he was found in contempt for refusing to discuss the withdrawal of the plea agreement with his client, along with his angry, confrontational, and disrespectful manner. The narrow reason for the contempt finding answers many of the objections made by attorney in this part of his argument.

[*P10] The collateral bar rule provides that individuals cannot challenge the validity of a court order by violating the order. See State v. Crown, 169 Vt. 547, 549, 726 A.2d 493, 495 (1999) (mem.) ("We do not generally allow a person who is under a court order to challenge it by violating it."); State v. Austin, 165 Vt. 389, 401, 685 A.2d 1076, 1084 (1996) (articulating rule and holding that probationer may not challenge validity of probation condition at revocation proceeding); Allen v. Iowa Dist. Court, 582 N.W.2d 506, 508-09 (Iowa 1998) (explaining that court orders must be obeyed, even if erroneous). Generally, attorneys must comply with a court's ruling regardless of whether the ruling has legal support. See Maness v. Meyers, 419 U.S. 449, 458, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975) ("Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect."). Thus, an attorney cannot generally defend against a contempt finding for violating an order by

arguing that the underlying order was unlawful. See Nakell v. Att'y Gen. of N.C., 15 F.3d 319, 324 (4th Cir. 1994) (dismissing attorney's claim that his disobedience of court instruction was justified because his legal position was correct). The rationale for this rule is to protect the efficient administration of justice and to encourage litigants to follow court orders. In re Hern Iron Works, Inc., 881 F.2d 722, 726 (9th Cir. 1989). If an attorney feels that the court's order is illegal or incorrect, the attorney's obligation is to object and preserve the point of error for appeal. Maness, 419 U.S. at 459.

[*P11] The rule is not without exception. "Courts have declined to apply the collateral bar rule when there was not an adequate and effective remedy to review the challenged ruling, or where compliance could cause irreparable injury which may not be repaired by appellate vindication." Allen, 582 N.W.2d at 509 (citing cases).[4] Attorney urges us to find an exception to the collateral bar rule in this case, claiming that compliance with the court's order would have resulted in irreparable harm. Attorney's basic argument is that following the court's order would have jeopardized his client's Fifth Amendment rights.

[*P12] In support of his argument, attorney cites Maness for the proposition that an attorney cannot be

[4] Two additional exceptions that have been applied in some cases are not applicable in this case. "If the issuing court lacks subject-matter jurisdiction over the underlying controversy or personal jurisdiction over the parties to it, its order may be violated with impunity." In re Novak, 932 F.2d 1397, 1401 (11th Cir. 1991); see Crown, 169 Vt. at 549-50, 726 A.2d at 496 (holding alleged defect was not jurisdictional). In addition, in some jurisdictions, orders that are transparently invalid or frivolous are excepted from the collateral bar rule. See, e.g., United States v. Mourad, 289 F.3d 174, 178 (1st Cir. 2002).

punished for violating a court order if the attorney believes in good faith that obedience might implicate his client's Fifth Amendment rights. Although we recognize this general principle, we do not agree that Maness is controlling in this situation. In Maness, a lawyer was held in contempt for advising his client that he could refuse to produce allegedly obscene magazines on the ground that they might incriminate him. 419 U.S. at 451-52. At the outset, the United States Supreme Court reiterated that court orders must be obeyed, even if a person believes they are incorrect. Id. at 458. The Court held, however, that the attorney could not be subjected to contempt for advising his client to invoke a Fifth Amendment privilege, even if this advice caused a witness to disobey a court order, where the attorney had a good faith belief that the material may have incriminated his client. Id. at 465.

[*P13] The situation on appeal differs in several respects from Maness. First, and most importantly, in Maness, there was a risk to the client's Fifth Amendment rights, and here no such risk existed. Attorney opines that "the self-incrimination risk of an unprotected allocution . . . is no different from the disclosures ordered in Maness." As we emphasized above, we disagree with attorney's characterization of the risk because the order that subjected attorney to contempt was not an order to the client to make potentially incriminating statements. The court directed attorney to discuss the implications of withdrawing from the plea agreement with the client. This order did not impact the client's constitutional protection against self-incrimination.

[*P14] Second, the attorney in Maness was punished for the advice he gave his client, not for the attorney's direct disobedience in the courtroom. Id. at 466. There,

counsel had advised his client that producing documents could incriminate him and therefore urged the client to invoke his Fifth Amendment right against self-incrimination. The Supreme Court noted that there were strong policy reasons for protecting a lawyer's ability to give honest advice to clients. Id. ("If performance of a lawyer's duty to advise a client that a privilege is available exposes a lawyer to the threat of contempt for giving honest advice it is hardly debatable that some advocates may lose their zeal for forthrightness and independence."). Whether clients choose to accept the attorney's advice and risk contempt charges themselves is another matter. The Maness Court was concerned with preserving the attorney's ability to speak candidly to his client about legal options. There was no claim that the attorney acted in direct disobedience of a court order. By contrast, attorney here was not punished for furnishing his client with faulty advice, but for failing to comply with the court's direction to consult with his client.

[*P15] Last, in Maness, there was no indication that the attorney acted in defiance of the court. In fact, the Supreme Court emphasized that the record was "devoid of evidence of contumacious conduct or any disrespect for the court." Id. at 469; see Waste Conversion Inc. v. Rollins Envtl. Servs. (NJ), Inc., 893 F.2d 605, 611 (3d Cir. 1990) (reversing contempt and emphasizing that attorneys' "conduct was neither defiant nor disrespectful"). In contrast, here, the court found that attorney was "angry, confrontational, and disrespectful" during the proceedings.

[*P16] Attorney also argues that other harms that could not be remedied on appeal might have resulted from complying with the court's instruction. These alleged harms include the court's rejection of the agreement, harm

to the attorney-client relationship, and an imprudent response by attorney's client. At best, these harms are speculative. In any event, they do not amount to the type of irreparable harm necessary to justify disobeying the court's order to consult with the client. See In re Hern Iron Works, 881 F.2d at 728-29 (noting that the irreparable injury exception is applied in only limited cases, namely those implicating Fifth Amendment privileges). Therefore, we conclude that the collateral bar rule prevents attorney from attacking the validity of the court's procedure, and we decline to address attorney's arguments pertaining to the merits of the procedure.

II.

[*P17] Attorney next challenges whether his actions were sufficient to constitute contempt, alleging that the court's factual findings were clearly erroneous. Attorney does not dispute that he violated the court's order, and we conclude that the court's finding that attorney's demeanor was disrespectful was not erroneous.

[*P18] The court gave attorney a direct order and, even though attorney disagreed with the order, he was still bound to follow it, as discussed above. Attorney's disobedience of a direct order was sufficient to support the contempt finding. Compare Pounders v. Watson, 521 U.S. 982, 989, 117 S. Ct. 2359, 138 L. Ed. 2d 976 (1997) (per curiam) (upholding state trial court's finding of summary contempt where attorney "willfully refused to comply with the court's order"), and Nakell, 15 F.3d at 324 (affirming contempt where a "rational trier of fact could find that Nakell willfully disobeyed a lawful order of the court"), with United States v. West, 21 F.3d 607, 608-09 (5th Cir.

1994) (reversing trial court's contempt order because attorney did not disobey an order or obstruct the administration of justice). The point was squarely covered in Sacher:

> Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge – his right is only respectfully to preserve his point for appeal.

343 U.S. at 9. Furthermore, an attorney "never has the right to let his temper, his zeal, or his intention lead him into disrespectful, accusative language to the court." MacInnis v. United States, 191 F.2d 157, 159 (9th Cir. 1951). Thus, we look not only to the words uttered but also to "the connection in which they were used, the tone, the look, the manner, the emphasis." In re Cooper, 32 Vt. 253, 256 (1859).

[*P19] Here, the court found that attorney, in a disrespectful manner, willfully violated its order to talk with the client before attempting to withdraw from the plea agreement, disrupting the proceedings and making it impossible to proceed. Although lawyers are encouraged to pursue their clients' interests zealously, as the United States Supreme Court explained, "advocacy that is 'fearless, vigorous, and effective,' does not extend to disruptive conduct in the course of trial and in knowing violation of a clear and specific direction from the trial judge." Pounders, 521 U.S. at 991 (quoting Sacher, 343 U.S. at 13).

[*P20] In this case, attorney's tone, look, manner, and emphasis played a role in the court's determination that attorney was in contempt. In re Cooper, 32 Vt. at 256. Ordinarily, we would be left to determine these circumstances from the transcript alone, an almost impossible task. For this case, however, the in-court events were videotaped to create the court record, and we have been able to view the videotape of the proceedings.[5] See V.R.Cr.P. 53.1(b) (videotape is the official record on appeal). While the tape does not fully capture the emotion of the moment, it does show that attorney was upset, as he stated, and angry. At the time the contempt order was issued, effective communication between the judge and attorney had ceased, and attorney appeared to be defiant. We find no abuse of discretion in the adjudication that attorney was in contempt.

[*P21] Having concluded that the court's factual findings were not erroneous, we also address the arguments of amici in this case that threatening public defenders with summary contempt will have a chilling effect on access to adequate representation. We acknowledge that continual threats of contempt may chill the bar's ability to adequately represent client interests. We also recognize, however, that contumacious behavior, namely, disobedience of a court order, cannot generally be excused as zealous advocacy. In re Ellenbogen, 315 U.S. App. D.C.

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[5] Although the availability of the videotape is helpful in our review, it is not the same as hearing the presentation and observing the presenters in person. Thus, the availability of the videotape does not change our standard of review. See State v. Freeman, 2004 VT 56, P8, 177 Vt. 478, 857 A.2d 295 (mem.) (holding court need not substitute its own judgment as to how event occurred based on testimonial evidence because of video tape of incident).

235, 72 F.3d 153, 158 (D.C. Cir. 1995). As the above-quoted passage from Sacher reflects, supra, P18, the duty of an advocate when faced with a clear court order, even one that is wrong, is to comply and respectfully seek review in a higher court if necessary. Both amicus briefs proceed from the premise that the order that counsel violated was an order to have the client give his presentence allocution before the court decided whether to accept the plea agreement, or at least an order that attorney convey to the client the wisdom of going forward under the court's procedure. We have held above that this view of the record is erroneous, and we stress it here again. The court's order was only that attorney consult with the client, and it gave no direction as to what advice attorney should give the client. Nor does this case require us to detail which powers belong to the lawyer and which belong to the client. See State v. Bean, 171 Vt. 290, 300, 762 A.2d 1259, 1266 (2000) (noting certain decisions which belong exclusively to the client). While attorney may have believed that a dispute over his power was coming, his refusal to talk with the client was premature.

[*P22] In short, we do not view this case as one in which the outcome will chill zealous advocacy, as opposed to deter contemptuous behavior. The line that attorney crossed was bright, and he did so out of anger at the judge's procedure, not out of a thoughtful judgment that his actions were necessary to protect his client's interests. Our procedures provide methods to challenge a judge's ruling that violates the governing rules, particularly where constitutional rights are in jeopardy. Contemptuous behavior is not one of those methods.

III.

[*P23] Next, attorney makes a number of objections to the procedures, or absence of procedures, that were employed. The first two objections argue that the trial judge should have been disqualified from determining whether attorney was in contempt, and that due process of law required a hearing on the prior instances of inappropriate conduct the judge relied upon. To address these arguments, we look first at the general procedures for criminal contempt.

[*P24] Criminal contempt proceedings are governed by Vermont Rule of Criminal Procedure 42, which is "virtually identical to Federal Rule 42." Reporter's Notes, V.R.Cr.P. 42. As stated above, Rule 42(a) contains an authorization for a summary contempt adjudication like the one in this case. Rule 42(b) contains an authorization for "Disposition Upon Notice and Hearing," which applies when Rule 42(a) does not. Rule 42(b) provides for notice and hearing, trial by jury, and trial before a different judge if the charge involves "disrespect to or criticism of a judge."

[*P25] In his first two procedural arguments, attorney claims that all or part of the procedures provided in Rule 42(b) were required in this case. First, he argues that Judge Toor should have been disqualified because she had become embroiled in a running controversy with attorney and was motivated by "perceived past slights and insulting behavior." Second, he makes a related argument that he was found in contempt for conduct occurring over an extended period of time, some of which was not on the record in the courtroom, and thus due process requires that he have an opportunity to be heard on all the charges.

If his arguments are correct, then summary contempt adjudication could not occur in this case.

[*P26] There are two justifications for summary contempt adjudication: efficiency and necessity. Such adjudication is efficient because the contemptuous conduct has occurred on the record, and before the judge, so that further factual development is unnecessary. Sacher, 343 U.S. at 9. Summary contempt adjudication is necessary in order to remove obstructions to the fair administration of justice. Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954). Over time, the necessity justification has become the primary reason for the use of summary procedures.

[*P27] With this background, we address attorney's argument that Judge Toor should not have presided over the contempt adjudication. The ground for such disqualification first arose in Offutt, where the trial court conducted a summary contempt adjudication of trial counsel after a trial had closed and the case was in the hands of the jury. The Court observed that trial judges should not "sit[] themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feeling against the lawyer." Id. The Court, however, cited and quoted Cooke v. United States, which held that such a rule applied where "'conditions do not make it impracticable, or where the delay may not injure public or private right.'" Id. (quoting Cooke v. United States, 267 U.S. 517, 539, 45 S. Ct. 390, 69 L. Ed. 767 (1925)). This point is reinforced in Mayberry v. Pennsylvania, 400 U.S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971). There, the Court discussed in detail the judge's options where a lawyer or litigant personally attacks the judge:

> A judge cannot be driven out of a case. Where, however, he does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place.

Id. at 463-64.

[*P28] We addressed this issue in State v. Allen, 145 Vt. at 601-02, 496 A.2d at 172-73, where defendant argued that contempt involving personal insults had to be referred to another judge at a later time under Rule 42(b). We stated that a "rule requiring that all flagrant personal insults be responded to only after delay would undermine the court's dignity and its authority. A judge is not merely an individual; he or she represents the authority of the law." Id. at 601, 496 A.2d at 172.

[*P29] In general, the Offutt rule – that judges must turn contempt adjudications over to colleagues if they are personally embroiled in disputes with the litigant or lawyer accused of contempt – is not applicable if the judge is acting under Rule 42(a) "the instant the contempt is committed," Mayberry, 400 U.S. at 463, out of necessity to prevent obstruction of a proceeding. See Barlow v. State, 237 Ga. App. 152, 513 S.E.2d 273, 277-78 (Ga. Ct. App. 1999) (allowing summary contempt after parties disobeyed direct, lawful order and warned parties behavior was contumacious); see generally R. Donaldson, Annotation, Disqualification of Judge in State Proceedings to Punish Contempt Against or Involving Himself in Open Court and in His Actual Presence, 37 A.L.R.4th 1004 (1985 & Supp. 2005) (categorizing cases involving disqualification of judges in contempt proceedings). The differences in the

requirements of Rules 42(a) and 42(b) are especially significant in small states like Vermont, where immediate action by another judge is usually impossible; as such, summary contempt adjudication in such states would also therefore be impossible. Nonetheless, by this holding, we are not ruling that personal hostility can never reach the stage where disqualification from the imposition of summary contempt is necessary to protect fundamental fairness even where obstruction of the proceeding is occurring. The circumstances of the personal hostility, however, must be extreme to warrant that result.[6] For example, in Sandstrom v. Butterworth, 738 F.2d 1200 (11th Cir. 1984) – the only case cited by attorney in which an appellate court ruled that the trial judge should have been disqualified from imposing an immediate summary contempt sentence during trial – the trial judge accused counsel of "acting like an animal" and told him that "for ten years you have had your nauseating effect upon this Court and every other court in this courthouse." Id. at 1203, 1204. Counsel's personal retorts were equally extreme. The personal embroilment was far beyond any disqualifying circumstances that might be present here.

[*P30] Even if the Offutt standard applied, we cannot conclude on this record that Judge Toor should have been disqualified. Judge Toor was sitting in a county where one judge covers all courts: civil, criminal, and

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[6] If the cause was based on conduct and events in other proceedings, the basic standard would be that for disqualifying a trial judge generally – that is, where the "judge has a personal bias or prejudice concerning a party or a party's lawyer." Code of Judicial Conduct, A.O. 10, Canon 3(E)(1)(a). Thus, the situation must be sufficiently extreme that the judge should have been disqualified from the proceeding that gave rise to the summary contempt judgment.

family. She was at the end of a six-month rotation. Criminal defense for the indigent is provided by a statewide public defender system. 13 V.S.A. §§ 5201-5277. Attorney was a public defender for the county. In this role, he was appearing regularly before Judge Toor. Inevitably, in that extensive interaction, each had views about how the other handled cases, both generally and in specific instances.

[*P31] As attorney himself has stressed in his brief, we want contempt citations to be used sparingly and in narrow circumstances. Thus, to the extent a judge has concerns about the behavior of a lawyer who is appearing regularly in the judge's court, we want the judge to find an outlet for those concerns short of contempt. In the ruling on the motion to vacate the contempt order, Judge Toor detailed the actions she had taken in the past to correct attorney's behavior.

[*P32] We recognize that attorney vigorously disputes that he had behaved inappropriately in the past, just as he disputes that his behavior was contemptuous on August 30. But this difference over professional conduct does not mean that the judge had developed personal animus against attorney. There is no allegation that attorney made personal attacks on the judge, the most common circumstances in the Offutt line of cases. See Mayberry, 400 U.S. at 465-66 (noting judge's difficulty in holding impartial contempt hearing after being repeatedly insulted throughout trial); United States v. Pina, 844 F.2d 1, 13-14 (1st Cir. 1988) (same). The sentence is not so excessive that it indicates improper motives. Although the judge made serious charges against attorney, all charges involved his professional behavior in specific instances. She said she acted "to punish the behavior [on August 30], to deter similar future behavior by Respondent, and to

make clear to others that such behavior would not be tolerated."[7]

[*P33] We also recognize that, like attorney, Judge Toor appears from the videotape to have become upset and angry over her interaction with attorney.[8] Perhaps her state of mind was demonstrated by her order to have attorney taken away in shackles, an order that was never implemented, and one that she regretted. If anything, however, her visible mental state showed she was reacting to the events of August 30, not imposing a calculated punishment for past behavior.

[*P34] In conclusion, if we found personal animus in this case sufficient to disqualify Judge Toor, we would have to find such personal animus in most cases, which would greatly reduce the availability of summary contempt even when necessary to prevent the obstruction of proceedings. We hold that Judge Toor was not disqualified from holding attorney in summary contempt.

[*P35] We have a similar response to attorney's related argument that due process requires that he have an opportunity to respond to the judge's charges in the ruling on the motion to vacate the contempt order. To

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[7] In a separate argument, attorney claims that the court misused criminal contempt as a behavior modification tool, made necessary because "kinder and gentler efforts to modify his behavior had been unsuccessful." While the judge used those words in the ruling on the motion to vacate, there is no indication that the judge attempted to lead attorney into contemptuous behavior in order to sanction. Instead the record reflects that Judge Toor believed that holding attorney in contempt was the necessary consequence of his actual behavior on August 30.

[8] In fact, Judge Toor described herself as angry in her ruling on the motion to vacate.

address this argument, we start with its presentation to the trial court. Following the contempt certification, attorney filed a motion to vacate the contempt order. The motion presented primarily legal argument, but also asked for an evidentiary hearing on the following issues: (1) whether attorney intended any contempt or disrespect to the court; (2) whether his intent was to represent his client "professionally, effectively and to the best of his abilities"; (3) whether his demeanor was "angry, confrontational, and disrespectful" as the court had found; (4) whether the contempt order was unprecedented in its harshness; and (5) whether the contempt order has had a chilling effect on trial lawyers in Vermont. The court denied the request for an evidentiary hearing because the conduct occurred in the court's presence so that the court had "first-hand knowledge of the relevant facts."

[*P36] On appeal, attorney reiterates the arguments made to the trial court but relies primarily on the court's ruling with its recitation of past inappropriate conduct. He argues that because the court stated that these past actions were part of the reason for the contempt citation he was entitled to present evidence to meet these charges.

[*P37] We cannot accept attorney's premise that the ruling on the motion to vacate showed that the contempt citation was made to punish attorney's past behavior. The court stated specifically that "these incidents were not the basis for the contempt finding." The court stated the basis for the contempt finding:

> Because of this direct refusal to comply with the court's order, as well as the disrespectful way in which it was done and its interference with the ongoing proceeding, the court concluded that it had no choice but to take immediate action. Such

> action was needed to punish the behavior, to deter similar future behavior by Respondent, and to make clear to others such behavior would not be tolerated.

On the other hand, the court made statements that indicate that she used discretion in determining whether a contempt citation was necessary, as well as discretion in choosing the sanction. In words emphasized by attorney, she stated:

> These [prior] incidents were not the basis for the contempt finding, but they contributed to the court's decision that there was no less severe action that would adequately address the situation. They also contributed to the court's decision to impose the sanction that it chose, rather than a monetary sanction.

These words are fully consistent with her statement that the contempt sanction was imposed for attorney's actions on August 30. As we stressed above, there will always be a context for a contempt sanction, and we do not want the court to strike too soon with a summary contempt judgment. Moreover, the sanction chosen is a criminal sentence that reflects the crime committed as well the circumstances and record of the person before the court. The one hallmark of the reported cases is that the judge involved rarely, if ever, finds contempt at the first opportunity, attempting other ways of correcting the offending conduct. That is a main reason why we accord discretion to a summary contempt judgment. See Allen, 145 Vt. at 600, 496 A.2d at 172 ("Orders of contempt are discretionary acts.").

[*P38] Properly exercised, summary criminal contempt is consistent with due process. In re Oliver, 333 U.S.

257, 275, 68 S. Ct. 499, 92 L. Ed. 682 (1948). We cannot conclude that criminal contempt was improperly exercised here. If anything, in comparison to other cases described in the reported decisions, the trial judge in this case was more candid and detailed in describing why she held attorney in contempt and why she imposed the sanction she did. Nevertheless, as we have held above, valid grounds existed to hold attorney in contempt, and the judge acted within her discretion in doing so, and in imposing the sanction she chose. Thus, the court did not err in refusing to consider the evidence attorney proffered in his motion to vacate. We do not believe that the additional information contained in the written ruling on the motion to vacate retroactively created a due process deficiency in the summary contempt adjudication or created the right to a hearing on the motion to vacate. If we found a due process right to a hearing on how the judge exercised her discretion, we would essentially eliminate the use of summary criminal contempt.[9]

IV.

[*P39] Attorney makes two additional procedural arguments: the trial court could not find attorney in contempt without first giving him an opportunity to respond to the contempt charge; and the court could not

[9] This is our fundamental disagreement with the dissent. The dissent denies that its desired rule – "any time a finding of or a sentence for contempt relies on alleged past misconduct," summary contempt cannot be used – would in effect eliminate the use of summary criminal contempt. Post, P58. We reiterate that there will almost always be a short or long history of improper actions before the judge concludes that only an adjudication of contempt will allow the proceeding to go forward properly.

hold him in contempt without first warning him that his conduct would produce that result. The first argument was squarely rejected in State v. Allen, 145 Vt. at 602 n.2, 496 A.2d at 173 n.2. We see no reason to reconsider that holding in this case where the direction to attorney was clear and was stated three times, and attorney's rejection of the judge's direction was equally clear. Attorney explained why he would not follow the court's direction; an additional opportunity to explain his conduct would have made little difference. Thus, even those courts in jurisdictions that ordinarily require that the person charged with summary contempt be given an opportunity to respond, see, e.g., Doral Produce Corp. v. Paul Steinberg Assoc., 347 F.3d 36, 45 (2d Cir. 2003) (recognizing factors that obviate need to afford alleged contemnor right to defend himself), would be unlikely to reverse because of the absence of such opportunity in this case.

[*P40] We also reject attorney's second procedural argument. This argument was not raised in attorney's motion to vacate and was therefore waived. Even if we reached the merits, we would conclude it is based on a factual error. Shortly before attorney was found in contempt, the trial court warned attorney that he might be held in contempt. Attorney has interpreted this warning as responding only to attorney's practice of talking over the judge. We read the warning above, supra, P4 n.3, more broadly. We believe the court stated that attorney should stop arguing with the directions of the court or he would be held in contempt.

[*P41] In any event, we would not reverse for lack of a warning in this case. Attorney urges us to adopt the relevant standard of the American Bar Association Criminal Justice Standards. ABA Criminal Justice Standards,

Special Functions of the Trial Judge, Standard 6-4.3 (2d ed.1980). That standard requires a clear warning if the conduct was not "willfully contemptuous." Id. Standard 6-4.2(a) The court found the conduct willfully contemptuous. Thus, the Standards would not require a warning in this case.

V.

[*P42] Last, attorney claims that, even if his acts were contemptuous, the court's sentence was an abuse of its discretion because it constituted a punishment and was unduly influenced by past history. "Punishment for contempt committed in the presence of the court is within the court's sound discretion and in the absence of an abuse thereof will not be disturbed on appeal." MacInnis, 191 F.2d at 162. Imprisonment is recognized by other courts as an appropriate sanction for disobedience of court orders. Id. (affirming three-month sentence for contempt consisting of disregarding orders and disrupting trial). We find no abuse in the forty-five-minute incarceration sanction.

[*P43] As we have held above, we conclude that the court acted to punish attorney's behavior on August 30 and not to punish his behavior in the past. The court may, however, consider past behavior in fashioning an appropriate sanction. See Allen, 145 Vt. at 602, 496 A.2d at 173 (concluding that trial court did not abuse its discretion in imposing ninety-day sentence for contempt where contemnor had a history of convictions, rather than removing contemnor from courtroom). Thus, the court appropriately considered attorney's prior behavior in determining its sentence for contempt.

Affirmed.

DISSENT BY: EATON

DISSENT:

[*P44] EATON, D.J., dissenting. The power of a trial court to summarily punish an attorney or party for criminal contempt is unique, as this case demonstrates. It is the only circumstance I am aware of in which a court may deprive an individual of liberty with none of the procedural safeguards that normally attend such a deprivation. It is for precisely this reason that the power of summary punishment of contempt has been strictly limited by the courts.

[*P45] To my knowledge, this is the first time in Vermont that an attorney has been criminally convicted and held in jail for efforts to protect a client's rights. This is of even greater concern given that attorney in this case never had the opportunity for a hearing. Rather, he was subject to a criminal conviction and yet received less due process than someone who is charged with a noise complaint or a speeding ticket. While the trial judge must have the power to maintain order and preserve respect for the institution of the court, this cannot be done at the expense of procedural fairness.

[*P46] Under Vermont Rule of Criminal Procedure 42(a), summary punishment may only be imposed where the misconduct constituting contempt occurs in the immediate presence of the court. In this case, there were two stages in the trial court's decision: (1) finding that an act of contempt had been committed; and (2) deciding the scope and severity of punishment for the contempt. With regard to the first stage, the trial court arguably relied solely on attorney's contemporaneous conduct (i.e., his disobedience of a court order on August 30, 2004) in

finding that attorney had committed an act of contempt. But with regard to the second stage, the trial court explicitly stated that it considered and relied upon a wider array of alleged past conduct by attorney in deciding the scope and severity of attorney's punishment. Under these circumstances, the trial court exceeded the scope of its authority in summarily punishing attorney without a hearing on his disputed past conduct. I would reverse and remand for such a hearing.[10]

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[10] While not the focus of this dissent, I also disagree with the majority that the collateral bar rule applies to preclude review of the merits of the trial court's order. The collateral bar rule mandates that attorneys preserve for appeal their objections to a trial court's order rather than simply disobey the order. Maness v. Meyers, 419 U.S. 449, 458-59, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975). As the majority recognizes, a necessary exception to this rule exists where effective appellate review is not available. See ante, P11. Yet the majority does not suggest how attorney in this case could have obtained review of the court's order other than through his disobedience.

Here, attorney's objection to consulting with his client would not be a basis for reversible error such that it could be reviewed in conjunction with an appeal in the underlying criminal matter. Neither was this a situation that would recur. Cf. State v. Cherryhomes, 114 N.M. 495, 840 P.2d 1261, 1263 (N.M. Ct. App. 1992) (reviewing contempt charge for attorney's violations of dress code). Stated another way, there was no way for attorney to both obey the order and preserve the point for appeal. Because attorney would not otherwise have had an opportunity for appellate review, he should be able to address the merits of the trial court's order in the appeal of his contempt conviction.

Upon reviewing the merits of the trial court order, I would first consider whether attorney was properly concerned about a potential violation of his client's Fifth Amendment rights and whether his disobedience of the trial court's order to consult was motivated by that concern. While compliance with the court's order to consult may not have led directly to such a violation, continued participation in the plea process as interpreted by the trial court could have jeopardized the client's rights indirectly. Second, upon reviewing the videotape of the hearing, I would conclude that attorney's behavior was not so disruptive as to support a

(Continued on following page)

I.

[*P47] The trial court's initial written certification of the contempt, entered the day after the trial court ordered attorney held in custody, focused on attorney's conduct of that day, stating that attorney's "direct refusal of the court's order, along with the angry, confrontational, and disrespectful manner in which [attorney] did so, made it impossible to proceed with the case." The court went on to note that "this [was] not the first time [attorney] has behaved inappropriately in the courtroom, as well as in chambers. The court has been extremely patient with his outbursts in the past, but this conduct cannot continue."

[*P48] The trial court elaborated on its reasoning in a much lengthier written order denying attorney's motion to vacate. At the outset, the court stated that because the decision turned on conduct that occurred in the court's presence, an evidentiary hearing was unnecessary. However, the discussion of the contempt finding leads off with the observation that "the undersigned has never in twenty-two years in the legal profession ... seen an attorney behave in as disrespectful and angry a manner towards a judge as [attorney] has on repeated occasions, both in the courtroom and in chambers." Further, an entire section of the order is devoted to discussion of "Past Inappropriate Conduct." In this section, the court explains that while "these incidents were not the basis for the contempt finding, ... they contributed to the court's decision that there was no less severe action that would

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finding of contempt based on his tone and attitude alone. While attorney might and should have conducted himself with greater decorum, these events all took place in a few moments under escalating conditions. Many courts routinely hear far worse from pro se litigants.

adequately address the situation." In conclusion, the court reiterates that it "had been faced over a period of months with repeated challenges to its authority, displays of anger, and other unprofessional conduct" by attorney. The court emphasizes that "if the conduct on August 30 had been the first incident of oppositional and disrespectful behavior by [attorney], the court likely would not have taken the action it did," but "the prior history" and "past experience" with attorney made it "apparent that a severe sanction was necessary to convey the message that such behavior was unacceptable." Thus, the behavior being punished ("such behavior") by all appearances includes the past misconduct referenced earlier in the same paragraph.

[*P49] The trial court's order supporting the finding of contempt and its punishment in essence characterizes attorney's conduct on August 30, 2004 as the "last straw" in a series of encounters over an extended period of time where attorney was disrespectful of the court. Indeed, the tone and reasoning of the order are permeated with an awareness and condemnation of alleged past misconduct by attorney, undermining the court's assertion that the contempt finding itself was not based, at least in part, on attorney's past misconduct. However, even assuming that the contempt finding was based solely on attorney's contemporaneous conduct of August 30, 2004, the court explicitly concedes that attorney's past misconduct was determinative in the second stage of its decision: punishing attorney with 45 minutes in custody.

II.

[*P50] Under Vermont Rule of Criminal Procedure 42, the trial court's admitted consideration of attorney's

past conduct should have entitled attorney to the minimal due process protections of notice and an opportunity to be heard. As discussed by the majority, Rule 42 provides two distinct procedures for addressing contempt: summary disposition and disposition upon notice and a hearing. Under the language and structure of the rule, notice and a hearing is the default procedure that should be followed unless the special circumstances warranting summary disposition are present.[11] See V.R.Cr.P. 42(b) (criminal contempt shall be prosecuted upon notice except where circumstances of 42(a) apply) & 42(a) (criminal contempt may be punished summarily where misconduct was committed in the actual presence of the court); see also State v. Lafayette, 152 Vt. 108, 111 n.2, 564 A.2d 1068, 1069 n.2 (1989) (characterizing summary punishment of contempt under Rule 42(a) as exception to general rule of notice and hearing).

[*P51] Case law interpreting Rule 42 and the analogous federal rule has emphasized that: (1) summary disposition is an extraordinary and narrow power; (2) this power is necessary for courts to maintain order where misconduct threatens the administration of justice; and (3) the fact that the misconduct occurs in the presence of the court and that there is no delay in finding and punishing the contempt excuses the absence of normal due process protections.

> Because the summary contempt sanction is not subject to the usual requirements of a jury trial or notice and opportunity to be heard, summary

[11] Rule 42(b) also provides for the right to a jury trial, but this would only be applicable to the finding of contempt, not the sentencing phase.

> contempt is a rule of necessity, reserved for exceptional circumstances and a narrow category of contempt. [Rule 42] allows summary proceedings for criminal contempt based on misconduct in the court's presence. . . . Both the court's role as an eyewitness and the desirability of a swift response militate against observance of the usual procedural safeguards.

United States v. Marshall, 371 F.3d 42, 45-46 (2d Cir. 2004) (citations, footnote, and quotations omitted). In the absence of these circumstances, summary punishment of contempt is not available. See, e.g., Walker v. Walker, 123 Vt. 430, 432, 192 A.2d 460, 461 (1963) (holding that due process requirement of an opportunity to be heard applies where alleged contemptuous conduct took place out of presence of court) (superseded by rule on other grounds as recognized by Chaker v. Chaker, 155 Vt. 20, 29, 581 A.2d 737, 742 (1990)).

[*P52] Thus, the justification for permitting the power of summary punishment is twofold: (1) because the misconduct is immediately observed by the court, evidentiary and procedural concerns are not at issue; and (2) in the absence of a summary procedure, the trial court would be unable to put an immediate end to misconduct disrupting the administration of justice. The justifications for summary punishment, in turn, define and limit the scope of the appropriate use of the summary punishment power. Stated another way, the power of summary punishment is necessary to remove obstacles to the administration of justice, but it must be used only to serve this end – not to punish past conduct. See Pounders v. Watson, 521 U.S. 982, 987, 117 S. Ct. 2359, 138 L. Ed. 2d 976 (1997) (recognizing that summary punishment of contempt is appropriate where "the court must act instantly to suppress

disturbance or violence or physical obstruction or disrespect to the court") (citation and quotations omitted); United States v. Cooper, 353 F.3d 161, 164 (2d Cir. 2003) (noting that "the summary contempt power is generally limited to cases in which immediate corrective steps are needed to restore order and maintain the dignity and authority of the court") (quotations omitted).

III.

[*P53] The majority recognizes that the trial court considered past misconduct in exercising its discretion with respect to punishment, ante, P37, but justifies the trial court's reliance on past misconduct in two ways. First, noting that "there will always be a context for a contempt sanction," the majority draws an analogy between summarily punishing contempt and criminal sentencing. Id. The majority asserts that, just as a criminal sentence reflects not only the crime for which the defendant was convicted, but also surrounding circumstances, a trial court should be able to consider past misconduct in summarily punishing contempt. Id. The critical distinction the majority overlooks, however, is that a criminal defendant has already been afforded ample due process protections throughout the course of prosecution, conviction and sentencing. See, e.g., In re Carter, 2004 VT 21, P49, 176 Vt. 322, 848 A.2d 281 (criminal defendant's right to counsel); State v. Merchant, 173 Vt. 249, 258, 790 A.2d 386, 393 (2001) (criminal defendant's right against self-incrimination); In re Cardinal, 162 Vt. 418, 419, 649 A.2d 227, 229 (1994) (criminal defendant's right to jury trial); V.R.Cr.P. 32 (procedural protections during sentencing). Further, under Rule 32(c)(4), a criminal defendant

has a right to comment and present evidence on sentencing issues.[12]

[*P54] By contrast, a party or attorney subject to summary punishment enjoys none of these protections because the contempt finding is made on the spot. For example, attorney in this case vigorously disputes the trial court's characterization of his alleged past misconduct. But unlike any other criminal defendant, who would be entitled to comment and present evidence relevant to sentencing under Rule 32(c)(4), attorney had no opportunity to contest these allegations. While summary process for contempt may be desirable for the reasons discussed above, the absence of due process protections at any stage defeats the analogy drawn by the majority to the process of criminal sentencing.

[*P55] Second, the majority draws a comparison between the facts of this case and those in State v. Allen, 145 Vt. 593, 496 A.2d 168 (1985). Specifically, the majority cites Allen for the proposition that "the court may . . . consider past behavior in fashioning an appropriate sanction." Ante, P43. The Allen Court, however, did not squarely address this question, and the decision does not support such a broad or conclusive proposition. Rather, the Court in Allen reasoned that the severity of the penalty for

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[12] Not only does an attorney subject to summary punishment for contempt receive less due process than a criminal defendant, he or she also receives less due process than an attorney sanctioned under the inherent powers of the court. In such cases, the sanctioning court must not only make a finding that the attorney acted in bad faith, but also provide notice and an opportunity for a hearing. Lawson v. Brown's Home Day Care Center, Inc., 2004 VT 61, P14, 177 Vt. 528, 861 A.2d 1048 (mem.). If the sanction imposed is punitive in nature, additional due process protections may apply. Id.

contempt in that case was not excessive because (1) as a repeat offender, the defendant was on notice as to proper decorum in a courtroom, and (2) the defendant had been disruptive previously during the same hearing. See Allen, 145 Vt. at 602, 496 A.2d at 173. Here, there is no issue of whether attorney was aware of proper decorum, nor was consideration of his past misconduct limited to behavior during the same hearing (or even in the same case). Neither of the elements of the holding in Allen supports the proposition that an attorney's or party's past misconduct – on multiple earlier dates and during multiple different proceedings – may be considered in deciding the severity of punishment for contempt, especially where that conduct is disputed.

[*P56] Finally, in addition to the above disagreements with the majority's approach, I also believe the majority spends too much time examining the question of whether the trial court suffered from personal bias in this case. Ante, PP23-34. This is understandable because attorney focuses on the same issue in his appellate brief. I believe, however, that the personal bias issue is beside the point here. In short, while personal bias on the part of the court must be shown to demonstrate entitlement to a hearing before a different judge, the presence or absence of personal bias has no bearing on the more fundamental question of whether attorney was entitled to the basic procedural protections of Rule 42(b). A lack of personal animus is not equivalent to due process. Under the rule, entitlement to notice and a hearing is assumed unless the trial court makes findings supporting imposition of summary punishment. Focusing on whether attorney made a showing of personal bias has the effect of suggesting that

attorney must affirmatively demonstrate his entitlement to notice and a hearing, which is not the case.

[*P57] As recognized in Allen, the fundamental distinction between situations where summary punishment is available and those where it is not is whether punishment is immediate or delayed, not whether the contempt is personal or impersonal in nature. See Allen, 145 Vt. at 601, 496 A.2d at 172-73 (holding that the trial court should be empowered to deal with some conduct immediately, to preserve authority of the court, even if contempt is personally directed at judge). The majority itself notes that the Offutt rule (i.e., disqualification of the presiding judge if contempt is personal in nature) does not apply where the trial court is acting under Rule 42(a) "the instant the contempt is committed." Ante, P29 (quoting Mayberry v. Pennsylvania, 400 U.S. 455, 463, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971)). This further emphasizes that the narrow purpose of summary punishment is to put an end to disruptive conduct without delay – not to punish past behavior or even deter future misdeeds.

IV.

[*P58] In my view, the trial court exceeded the scope of its authority in employing summary punishment under the facts of this case. The majority contends that "if we found a due process right to a hearing on how the judge exercised her discretion, we would essentially eliminate the use of summary criminal contempt." Ante, P38 I respectfully disagree. I believe for the power of summary punishment of contempt to be used effectively and fairly there must be a clear rule for when use of that power is permissible. The distinction between conduct that is

observed and punished simultaneously and alleged past misconduct is a bright-line rule that would be easy to enforce and understand. Any time a finding of or a sentence for contempt relies on alleged past misconduct, and therefore requires fact-finding beyond the scope of what the judge has immediately observed, the additional procedural protections of Rule 42(b) should apply.

[*P59] I am fully cognizant of the need and right of the trial judge to control the courtroom and maintain the dignity and authority of the court. In that regard, the presiding judge must be given the authority to determine and punish summary contempt when it occurs in the judge's presence. Here, it is admitted that the trial court imposed a sentence that it would not have but for the alleged instances of past misconduct. These allegations should have been tested in the crucible of a hearing. Attorney here has been denied any opportunity to do so. I cannot in good conscience agree that he has been afforded the protections that due process requires.

[*P60] For these reasons, the trial court should have allowed a hearing on the motion to vacate the contempt order, and I would remand to the trial court for that purpose. I respectfully dissent.

STATE OF VERMONT
ADDISON COUNTY, SS.

STATE OF VERMONT	)	VERMONT DISTRICT COURT
	)	
VS.	)	Docket NoS. 163-3-03,
TERRY P. BARROWS	)	602-10-03, and 240-6-04 Ancr

ORDER

(Filed Aug. 31, 2004)

The undersigned hereby certifies pursuant to V. R. Cr.P.42(a) that Lorin Duckman, Esq., was in contempt of court on August 30, 2004. The facts are as follows. During a sentencing proceeding on a plea agreement signed by his client in this cage, Attorney Duckman objected to the court hearing from the defendant before deciding whether to accept the plea agreement. Attorney Duckman insisted that the court tell him in advance whether it would accept the proposed agreement. The court declined to do so, indicating that sentencing determinations include consideration of the defendant's acceptance of responsibility or lack thereof, and the court would have to hear from the defendant to make that determination.

Attorney Duckman then angrily declared that he was withdrawing his client's plea. The court indicated that counsel should consult with the client before precipitously taking such a step. The court directed Attorney Duckman to go speak with his client about the pros and cons of withdrawing the plea before the court would consider allowing that. Attorney Duckman angrily accused the judge of interfering with the attorney-client relationship and refused to go consult with his client.

The court hereby certifies that this direct refusal of the courts order, along with the angry, confrontational, and disrespectful manner in which Attorney Duckman did so, made it impossible to proceed with the case, evidenced an utterly inappropriate manner for a lawyer to use in the courtroom towards a judge and constituted contempt of court. The court therefore summarily punished the contempt by ordering Attorney Duckman held in custody until after the lunch hour. At that time, he was released from custody and the case rescheduled to Wednesday at 1:00 to continue the sentencing.

The court notes that this is not the first time that Attorney Duckman has behaved inappropriately in the courtroom, as well as in chambers. The court has been extremely patient with his outbursts in the past, but this conduct cannot continue.

Dated at Middlebury, Vermont this 31st day of August, 2004.

/s/ Helen M. Toor
Helen M. Toor
Presiding Judge

STATE OF VERMONT
ADDISON COUNTY, SS.

In re:	) VERMONT DISTRICT
	) COURT
LORIN DUCKMAN	)
	) Docket No. 390-9-04 Ancr

RULING ON MOTION TO
VACATE CONTEMPT ORDER

(Filed Oct. 20, 2004)

On August 30, the undersigned held Attorney Lorin Duckman (hereinafter "Respondent") in contempt of court based upon his behavior before her in the courtroom that day. The court made a summary contempt finding and had Respondent placed in the court's holding cell until after the lunch hour – approximately 45 minutes. The court subsequently issued a written certification as required by Rule 42(a) of the Vermont Rules of Criminal Procedure.

Respondent has now moved to have the finding of contempt vacated. He has also requested a hearing to present evidence. The issue before the court turns on conduct that occurred in the court's presence. The court therefore has first-hand knowledge of the relevant facts, and a hearing is unnecessary. *See, Cooke v. United States*, 267 U.S. 517, 534 (1925) (because the judge has "observed the contemptuous act, there is 'no need of evidence[.]'") (citation omitted).

The Defender General's Office and the Vermont Association of Criminal Defense Lawyers ("VACDL") have also moved for leave to file memoranda in support of the motion to vacate. Those motions, however, are premised upon the erroneous belief that the contempt finding was

based upon a "respectful disagreement" by Attorney Duckman and that it implicated "the Fifth Amendment rights of the defendant not to be forced to allocute while still under a plea of not guilty and well before sentencing." *See* Motion of VACDL at 2; Motion of Valerio at 2. Because the facts are otherwise, the proffered memoranda would be of little assistance to the court. The motions to file amicus memoranda are therefore denied.

Introduction

The undersigned has never in twenty-two years in the legal profession – seventeen years of practicing law, and five years on the bench – seen an attorney behave in as disrespectful and angry a manner towards a judge as Attorney Duckman has on repeated occasions, both in the courtroom and in chambers. Prior to August 30, 2004, the court had attempted to address Respondent's behaviors by, for example, speaking to Respondent in chambers, asking one of his superiors to speak to him, and clearly explaining the court's expectations of him. He and his superior were also advised that if such conduct continued the court would be forced to take more serious action. On at least one prior occasion, Respondent was warned that he was on the verge of being held in contempt.

On August 30, not only did Respondent display some of the same rude and disrespectful behavior that he had displayed on previous occasions – repeatedly interrupting the judge – but he went further than he had in the past. On this occasion, he willfully refused to comply with a direct order of the court intended to protect his client's right to determine whether to proceed with a guilty plea pursuant to a proffered plea agreement, or whether to

withdraw from that agreement. Moreover, Respondent's refusal forced the courtroom proceedings to come to a halt. Because of this direct refusal to comply with the court's order, as well as the disrespectful way in which it was done and its interference with the ongoing proceeding, the court concluded that it had no choice but to take immediate action. Such action was needed to punish the behavior, to deter similar future behavior by Respondent, and to make clear to others that such behavior would not be tolerated. Because Attorney Duckman's actions demonstrated that repeated prior attempts to remedy his behavior had been unsuccessful, the court also concluded that a severe sanction was necessary. For all of these reasons, the court imposed the sanction of a brief incarceration until after the lunch hour.

The court acknowledges at the outset that ordering counsel to be shackled was an unnecessary step, borne of momentary anger and frustration at the many occasions of disrespectful and unprofessional conduct by Respondent. The court regrets those words.[1] However, the finding of contempt, and the sanction of brief incarceration, were imposed not out of anger but for the reasons set forth above.

The court will set forth below the history of prior inappropriate conduct, the specific proceedings that took place on August 30, and the legal basis for its ruling.

1. Past Inappropriate Conduct

The court intentionally chose not to reference specific prior incidents in its initial contempt order, so as not to

[1] Respondent was in fact never shackled.

embarrass Respondent publicly. However, given his failure to acknowledge that his behavior was in any way inappropriate, and given the filing of this motion to vacate, the court will here set forth at least a portion of the prior history. Before doing so, however, the court does wish to note that on many occasions Attorney Duckman has behaved appropriately, and that he has in many cases provided excellent representation to his clients. He has the skills to be an outstanding courtroom advocate. Those skills, however, do not excuse the type of behavior at issue here, and this behavior interferes with his ability to be a successful advocate for his clients.

The prior inappropriate conduct includes the following: literally shouting at the undersigned in chambers in an extremely agitated and threatening manner, then storming out of chambers in the middle of the conversation; stating in the judge's presence that "most judges are petty little tyrants"; repeatedly wearing blue jeans and/or t-shirts to court despite a directive to wear professional attire; shouting at the Court Manager when she spoke to him privately about blue jeans not being acceptable courtroom attire; appearing late for court on repeated occasions; becoming angry in the courtroom when told that hearings were expected to start on time, and rudely accusing the court of valuing punctuality too much and justice not enough; repeatedly interrupting the judge while she was speaking despite being clearly told that the rules of the courtroom were that counsel were not to interrupt the judge when she was speaking and not to interrupt opposing counsel when they were speaking; repeatedly arguing with the judge after she had ruled against him; angrily turning his back on the judge in the courtroom and storming towards the door, stopping only

when told he was on the verge of being held in contempt; and angrily demanding of the judge in the courtroom "don't point your finger at me!"

The above are a brief summary of some of the prior instances of unprofessional conduct. The court recites these examples as a backdrop to its decision to finally sanction Attorney Duckman on August 30. These incidents were not the basis for the contempt finding, but they contributed to the court's decision that there was no less severe action that would adequately address the situation. They also contributed to the court's decision to impose the sanction that it chose, rather than a monetary sanction.[2]

2. The Proceedings at Issue

The hearing in question was in the cases of *State v. Barrows,* Docket Nos. 163-3-03 Ancr, 602-10-03 Ancr, and 240-6-04 Ancr.[3] The cases had been scheduled for a change of plea on August 30. At the start of the hearing, a written plea agreement was provided to the court, signed by the prosecutor, by Mr. Barrows, and by his counsel, Attorney

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[2] The court notes that, while it was aware of the fact that Respondent had been removed from his prior position as a judge in New York, the court had intentionally avoided reading about the basis for that removal so as not to color its views of him. After the August 30 incident, the court read the New York decision. *See In re Lorin Duckman*, 699 N.E.2d 872 (N.Y. 1998). Having now read that decision, the court finds that it reinforces the court's earlier conclusion that Respondent does not respond to constructive criticism. *See also, In re Lorin Duckman*, Decision of the New York State Commission on Judicial Conduct (October 1997) (available at www.scjc.state.ny.us/Determinations/D/duckman.htm).

[3] The original certification of contempt was issued under those docket numbers. Subsequently, the clerk assigned this contempt matter a separate caption and docket number.

Duckman. That agreement reflected an agreed-upon term of incarceration and agreed-upon conditions of probation. It did not reflect a request for a pre-sentence investigation ("PSI"). Nor did it request that sentencing occur at a later date.

The proposed sentence did not appear on its face to be outside the scope of what the court would consider. Normally, when offered a proposed plea agreement that appears within the scope of reasonableness on its face, the court would first go through the Rule 11 colloquy with the defendant. Some guilty pleas fail at that stage because the defendant changes his or her mind at the last minute, or asks a question that demonstrates an element of the charge cannot be met, or flat-out denies the offense. In such cases, unless there is an agreement by all to proceed with a "no contest" plea instead, the plea agreement is rejected.

If the Rule 11 colloquy proceeds satisfactorily, the usual procedure when the parties have reached an agreement would then be either to impose the agreed-upon sentence or to hear from one or both counsel about why they feel it is an appropriate sentence. If a victim is present and wishes to be heard, the court would hear the victim's statement as well. At any time throughout these proceedings the court could determine that it will not accept the agreement – for example, because the defendant does not acknowledge sufficient elements of the offense for the court to find him guilty, or because the court concludes after hearing from the attorneys or the victim that the sentence is too severe or not severe enough. If the court does so, under Vermont law the Defendant has an absolute right to withdraw his plea, and nothing he said during the proceedings could be used against him. V.R.Cr.P. 11(e)(4) (if plea agreement is rejected by the

court, "the court shall . . . afford a defendant who has already pleaded the opportunity to then withdraw his plea"); *Id.* 11(e)(5) ("evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea . .. (A) a plea of guilty which was later withdrawn; (B) a plea of mole contendere; (C) any statement made in the course of any proceedings under this rule").

In this case, the State advised the court at the outset that the victim did not agree with the proposed plea agreement and wished to be heard on that. Therefore, rather than proceeding to the Rule 11 colloquy first, the court chose an atypical procedure – to first hear from the victim. Defense counsel raised no objection to this procedure. The court's rationale was that if the court heard from the victim and determined that it would definitely not accept the plea, the court would notify the parties rather than proceeding to the colloquy with the defendant. The defendant could then determine whether he wished to proceed, seek to negotiate a different proposal with the State that the court might accept, or proceed to trial.

After hearing from the victim, the court was still willing to consider the proposed plea agreement.[4] Thus, the court turned to the defendant to conduct the Rule 11 colloquy and, following that, to hear any further statement the defendant wished to make. At that time, Attorney Duckman objected to the court conducting the Rule 11

[4] The court did ask counsel about some other possible probation conditions: a letter of apology and community service. The victim declined to accept a letter of apology, and Attorney Duckman and the prosecutor offered good reasons why community service might not be appropriate. The court accepted those reasons and proceeded.

colloquy and demanded that the court first state whether the plea agreement would be accepted.

The court declined to do so. First, it was obvious that the court was still willing to *consider* the proposed sentence, because it would not have proceeded to the Rule 11 colloquy if that were not the case. Second, a judge cannot properly discharge her duties in accepting a guilty plea if the defendant does not acknowledge guilt. Thus, the court could not commit in advance to accepting any agreement until that step occurred. Third, one element in determining whether a proposed sentence is appropriate is whether the defendant accepts responsibility for his actions and demonstrates remorse for the illegal conduct. *See, e.g.*, V.R. Cr.P. 11 Reporter's Notes, p. 59 ("The judge is, of course, not expected merely to rubberstamp the agreement without independent evaluation such as he would undertake in the absence of an agreement. The [ABA] Minimum Standards contain a list of considerations appropriate for application [including] (ii) that the Defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct[.]").

Attorney Duckman objected to the court conducting the Rule 11 colloquy, and stated that he was withdrawing the client's plea.[5] The court stated that it did not understand the attorney's basis for objecting. Respondent's counsel now argues in this motion to vacate that Rule 11 requires a judge to state in advance of taking the plea whether she will accept the proposed sentence. However,

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[5] No plea had yet been entered. Thus, the court understood Respondent to mean that, without consulting his client, he was overruling his client's prior decision to seek the court's approval of the proposed plea agreement.

Attorney Duckman never raised this argument in court, either in this case or in any prior case before this court. Nor has the court ever had any other attorney request such a procedure or argue that such a procedure was required. The rule states that a judge "may" use such a procedure. V.R.Cr.P. 11(e)(2). It does not require that a judge do so. *See Town of Calais v. County Road Commissioners*, 173 Vt. 620, 621 (2002) ("The plain, ordinary meaning of the word 'may' indicates that a statute is permissive, not mandatory.") *In re D.L.*, 164 Vt. 223, 234 (1995) (because statute states that a judge "may" conduct an inquest, judges "are under no obligation to conduct an inquest").

While the court was trying to ascertain from Respondent what the nature of his objection was, he began to interrupt her while she was speaking. At no time did he offer any reasoned explanation for his objection.[6] Instead, he continued to interrupt the court repeatedly. The court warned him that if he continued to interrupt he would be held in contempt. He again interrupted the court. Nonetheless, the court did not hold him in contempt.

The court explained its view that an attorney does not have the authority to withdraw a client's consent to a plea agreement without consultation with the client, and directed Respondent to confer with his client before the court would accept the withdrawal. The court made clear that if the client, after consultation, wished to withdraw from the agreement and not enter a plea, the court would accept that choice. Respondent accused the court of "interfering with my relationship with my client" and, when

[6] His only objection was that he was "upset."

expressly told again to go talk to his client, he continued to talk while the court was talking and stated "I don't think you can tell me to go talk to my client." He did not set forth any legal basis for that statement. The court stated "Well, I just did," Respondent replied "But I'm not going to go do it." At that point, the court found him in contempt of court for expressly refusing to comply with the court's order, directed the court officer to place him in the holding cell, and stated "we will speak at 1:00."

The court then rose to leave the courtroom, adding while doing so the regrettable phrase "under shackles." As the court was standing to leave the bench, Attorney Duckman requested counsel. The court clarified the order, by explaining "Mr. Duckman, I have just found you in summary contempt by ignoring the court's orders, . . . " at which time Respondent *yet again* interrupted her as she was about to explain that in a summary contempt proceeding the respondent is not entitled to counsel. The court had to raise her voice to be heard over Mr. Duckman, stating, "*Excuse me*, if you continue talking when I am speaking, I will hold you overnight, do you understand?" The court then restated its finding and stated that Respondent was being held until 1:00.

The finding of contempt occurred at 12:17. The court directed court staff to speak to Respondent's client to explain that he should return at 1:00 to continue the hearing. Respondent was held in the courthouse holding cell until approximately 1:00, when the court released him. Given Respondent's emotional state at that time, the

court then granted his request for a continuance of the hearing and rescheduled it for later in the week.[7]

The reason for the court's order that Respondent speak with his client was based upon the court's concern that the client had expressed a desire to plead guilty pursuant to the written agreement he had signed, he was being given the opportunity to do so, and his counsel was deciding without consultation with the client to take that option away from the client. It appeared that this precipitous step offered no benefit to the client, because (1) he would have an absolute right to withdraw the plea if the court did not accept the proposed sentence, and (2) nothing he said during the Rule 11 colloquy or any subsequent allocution could be used against him later if he did so. *See* V.R.Cr.P. 11(e)(4) and (e)(5). Thus, if he proceeded the court might well accept the proposal, and he had nothing to lose. If he withdrew from the agreement, he would lose the opportunity he had sought to resolve the cases without trial.

Because of these concerns, the court believed the client had to participate in the decision to withdraw from the plea agreement. *See,* 1 American Bar Association Standards for Criminal Justice, Standard 4-5.2(a) (3d ed. 1993) (Decisions with regard to what plea to enter and whether to accept a plea agreement are ones "to be made by the accused after full consultation with counsel" rather

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[7] The matter was subsequently rescheduled yet again when the court granted the Defender General's request for time to appoint substitute counsel for Mr. Barrows. After new counsel had been appointed, Mr. Barrows ultimately proceeded with his guilty pleas pursuant to the plea agreement on September 14.

than by counsel alone); *Id.*, Commentary to Standard 4-5.2 ("it is the defendant who must make the choice as to the plea to be entered and, concomitantly, whether to accept a proffered plea agreement . . . [I]t is highly improper for counsel to demand that the defendant follow what counsel perceives as the desirable course. . . . [B]ecause of the fundamental nature of decisions such as these, so crucial to the accused's fate, the accused must make the decisions himself or herself.").

The court's finding of contempt was based upon the willful refusal of counsel to comply with a clear order of the court, as well as the "angry, confrontational and disrespectful manner" in which he did so. *See* Order (August 31, 2004). When the court referred to Respondent's disrespectful manner, it referred not only to his repeated interruptions while the court was speaking, but to his choice of words. For example, he did not say something such as "your honor, I believe that the case law states that counsel may decide on a client's behalf whether to withdraw a plea without consultation with the client." Instead, he said "you are interfering with my relationship with my client." This accusatory statement was in itself disrespectful.[8]

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[8] The court also notes that the videotape of the proceedings does not adequately convey the level of anger and emotion displayed by Attorney Duckman in person. The court has made this same observation in reviewing other videotaped court proceedings: the medium does not fully capture the emotion with which witnesses testify, the affect of an individual, or the subtleties of a tone of voice or an angry glare. While Respondent's angry manner was not itself a basis for the finding, of contempt; it reenforced the court's conclusion that the contempt was willful and intentional, *See, In re Cooper,* 32 Vt. 253, 256 (1859) ("In determining whether the language used was or was not contempt, resort may be had, not merely to the very words used, but to the

(Continued on following page)

Likewise, after the court ordered him to consult with his client, he did not say something such as "I believe I am bound by my ethical obligations to object," or "may I be heard on the basis for my objection?" Instead, he said "I'm not going to do it." Again, this defiant statement in response to a judge's direct order was in and of itself contemptuous,

3. The Legal Basis for The Finding of Contempt

Never before has the court held an attorney in contempt. It is the court's hope that it will never again have cause to do so. However, there is no question that "[l]ongstanding precedent confirms the power of courts to find summary contempt and impose punishment" *Pounders v. Watson,* 521 U.S. 982, 987 (1997). As the Supreme Court noted over seventy-five years ago:

> To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. . . . Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law[.]

Cooke v. United States, 267 U.S. 517, 534 (1925). The Vermont Supreme Court long ago declared:

> The power to punish for contempt is inherent in the nature and constitution of a court . . . It represses disorder, violence and excitement, and

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surrounding circumstances; the connection in which they were used, the tone, the look, the manner, the emphasis.").

> preserves the gravity, tranquility, decorum and courtesy that are necessary to the impartial investigation of controversies. It secures respect for the law, by requiring respect and obedience to those who represent its authority. Its exercise is not merely personal to the court and its dignity, it is due to the authority of law and the administration of justice.

In re Cooper, 32 Vt. 253, 257(1859).

Summary contempt, without the right to counsel or a hearing, may be imposed only when the acts are directly observed by the judge, and where "immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." *In re Oliver,* 333 U.S. 257, 275 (1948); V. R. Cr. P. 42(a) (summary punishment appropriate if contempt occurs "in the actual presence of the court").

Direct refusal to comply with a court's clear order is a basis for a finding of contempt. "[I]f the ruling is adverse, it is not counsel's right to resist it or to insult the judge – his right is only respectfully to preserve his point for appeal." *Sacher v. United States,* 343 U.S. 1, 9 (1952). It is not a defense that the person to whom the order is directed believed it to be wrong. The United States Supreme Court has stated the rule as follows:

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.

Maness v. Meyers, 419 U.S. 449, 458 (1975).[9] This is sometimes referred to as the "collateral bar rule," meaning that the underlying order cannot be challenged in the collateral proceeding relating to the contempt.

A classic example is a case in which civil rights protesters – eight black ministers, including Martin Luther King – disregarded an injunction barring them from marching to protest race discrimination, citing their belief that the injunction was unconstitutional. *Walker v. City of Birmingham,* 388 U.S. 307 (1967). They were jailed for five days for contempt for violating the court order. Their view of the law was ultimately proved correct – the ordinance underlying the court's order was ultimately held to be void for vagueness. *Id.* at 343 (Brennan, J., dissenting). Nonetheless, the Supreme Court upheld the contempt findings:

> The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives . . . One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

Id. at 320-21.

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[9] Although the court in *Maness* went on to reverse the finding of contempt, that was based upon an exception applicable when Fifth Amendment rights are at issue. That is not the case here.

Vermont law is to the same effect. The Vermont Supreme Court has noted that "[t]he power, in particular, to punish disobedience to judicial orders 'is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority.'" *In re C.W.*, 169 Vt. 512, 517 (1999) (citation omitted). Court orders must be followed, whether the court is correct or incorrect:

> In the relations of parent and child, or teacher and pupil, or the court and its bar, the decisions of the superior, for the time being, are final and are to be respected, whether wise or foolish. . . . The counsel must submit in a justice court as well as in this court, and with the same formal respect, however difficult it may be either there or here.

In re Cooper, 32 Vt. at 263-64. *See also, Socony Mobil Oil Co. v. Northern Oil Co.*, 126 Vt. 160, 164 (1966) ("a contempt proceeding based on the violation of a court order does not reopen to reconsideration the legal or actual basis of the order so as to result in a retrial of the original controversy."); 12 V.S.A. § 122 ("when a party violates an order made against him in a cause . . . pending before . . . the district court . . . contempt proceedings may be instituted against him . . . "); *State v. Allen*, 145 Vt. 593, 600 (1985) ("The power to punish for contempt is indispensable to secure both 'the proper transaction and dispatch of business [and] *the respect and obedience due to the court and necessary for the administration of justice.*'") (citation omitted; emphasis in original).

Other jurisdictions have reached the same conclusion. *See, e.g., State v. Zahn*, 562 N.W.2d 737, 740 (N.D. 1997) ("Intentional disobedience of a court order constitutes contempt."); *McLean v. Central States, Southeast and*

Southwest Areas Pension Fund, 762 F.2d 1204, 1210 (4th Cir. 1985) ("a criminal contempt sanction stands even if the underlying order is reversed," although the same is not true of civil contempt); *Nashville Corp. v. United Steelworkers of America,* 215 S.W.2d 818, 821 (Tenn. 1948) (citing with approval lower court's statement that "[t]he party, upon whom the order or command of the court operates, is not allowed to speculate upon the equity of the bill, or the legality or regularity of the order or decree, . . . but his simple duty is to obey; and when he disobeys it is a duty the court owes to itself and to the public to punish him at once."). *See also, Tenn. Op. Atty Gen. No. 00-035,* 2000 WL 289571 (Tenn. A.G. 2000) ("The fact that a court order is erroneous, however, does not excuse compliance with the order. If the court has jurisdiction over the person and the subject matter, it must be followed until it is set aside, even if it is erroneous.").

The reasons for such a rule are obvious. By its nature, our adversary system virtually assures that at every turn of a case, one side is likely to disagree with any ruling a judge makes. If lawyers were free to disregard every ruling they felt was in error, our entire legal system would disintegrate. As the District of Columbia Circuit has noted:

> Appellant and *amici* have embellished their briefs with unexceptionable remarks about the critical role that an independent and unbowed bar plays in preserving the liberty that defines our nation and that we are sworn to protect. We agree. . . . Nonetheless, the advocate in our legal system is expected to abide by the rulings of the presiding judge. "[I]f the ruling is adverse, it is not counsel's right to resist it . . . his right is only respectfully to preserve his point for appeal." . . .

> Absent such a requirement, trials would wander down every by-way, no matter how impermissible, in a sprawling chaos that would render the adjudication close to random. In the long run, such chaos is hardly in the interests of defendants as a whole, much less the interests of society.

In re Holloway, 995 F. 2d 1080, 1088 (D.C. Cir. 1993) (citation omitted). Another court has declared:

> The correctness of a court order or ruling is not contested by deciding to willfully disobey it, without suffering the consequences of that disobedience. Respect for judicial process is a small price for the civilizing hand of law.

Kidd v. Caldwell, 371 So.2d 247, 252 (La. 1979), *quoting City of Lake Charles v. Bell,* 347 So.2d 494 (La. 19977 [sic]). *See also, In re Establishment Inspection of Hern Iron Works. Inc.,* 881 F.2d 722, 726 (9th Cir. 1989) ("a smoothly functioning judicial process may be jeopardized if parties are able to determine for themselves when and how to obey court orders.").[10]

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[10] In his reply memorandum, Respondent disputes the existence of the collateral bar doctrine, citing several cases for the proposition that the validity of the court's order is relevant to whether the contempt ruling is valid. Reply Mem. at 2-3. However, the cited cases are not on point. Two of the cases – *State v. Barrows,* 158 Vt. 445 (1992), and *In re F.E.F.,* 156 Vt. 503 (1991) – relate to *civil* contempt, to which different principles apply. *See, e.g., Hern Iron Works,* 881 F.2d at 726 n. 11 ("The collateral bar rule applies only to criminal contempt charges. The invalidity of the underlying order is always a defense to a civil contempt charge."). One case does not appear at the citation offered – *State v. Williams,* 884 P.2d 775 (Kan. 1993). With respect to *In re Nugent,* 427 A.2d 1154 (Pa. 1980), this court agrees with the dissenting opinions, which found the majority opinion unpersuasive. *Id.* at 1157-60.

(Continued on following page)

It is not relevant whether Respondent acted in a good faith belief that the court order was in error. Summary contempt orders against attorneys have been upheld in circumstances where, as here, counsel assert that they defied the court's order because they had a good faith belief that there was a legal basis on which to do so. For example, where an attorney respectfully refused to accept the court's order of appointment as counsel because he believed it violated an ethics opinion, the finding of contempt was upheld. *State v. Jones* (*In re Banks*), 726 S.W.2d 515, 521 (Tenn. 1987) ("the refusal to obey a lawful court order, although accompanied by lofty motivation and respectful and impeccable conduct, . . . may properly be adjudged contempt of court.") The appellate court noted that even if the trial judge's order is erroneous "and is reversed on appeal, an adjudication of contempt for failure to obey that order will be sustained." *Id.* at 517, citing *Vanvabry v. Staton,* 12 S.W. 786 (Tenn. 1890) (also cited as *In re Vanvaver*). As the court in *Vanvaver* declared, such a rule is necessary to assure "the just respect, and obedience that every Court is entitled to demand and receive." 12 S.W. at 791.

The other cases all arose under exceptions to the rule which are not applicable here. For example, *Maness v. Meters,* 419 U.S. 449 (1975), which restates the usual rule as noted above, created an exception for cases involving Fifth Amendment rights where the right cannot be vindicated on appeal. *See, Pennsylvania v. Local Union 542 Int'l Union of Operating Engineers,* 552 F.2d 498, 506 (3rd Cir. 1977) ("The narrow holding in Maness was based on the peculiar nature of the fifth amendment privilege."). Two turned on the appellate court's finding that the trial court's order was "transparently unconstitutional," an exception some courts have applied to the collateral bar rule. *Johnson v. Virginia,* 373 U.S. 61, 62 (1963); *State v. Alston,* 887 P.2d 681, 690-91 (Kan. 1994). Another turned on the trial court's lack of subject matter jurisdiction. *Allen v. Iowa District Court for Polk County,* 582 N.W.2d 506, 509 (Iowa 1998).

Similarly, the Third Circuit has affirmed criminal contempt findings involving an attorney who refused to comply with the trial court's order to not state the basis for his objection, despite the lawyer's argument that he acted to protect his client's rights. *Pennsylvania v. Local Union 542. Int'l Union of Operating Engineers,* 552 F.2d 498 (3rd Cir. 1977). The court explained:

> We do not dispute an attorney's right in trying a case to be contentious, fearless, and zealous in representing his client's interests. . . . But the case law establishes that a direct order of the trial judge fixes the limits of proper advocacy; the vigor permissible in representing a client's interests has never included the flouting of a judge's rulings. . . . Disobedience is not an ingredient of contentiousness; defiance is not an element of zealousness.

Id. at 506 (citations omitted). *See also, United States v. Baldwin,* 770 F.2d 1550, 1558 (11th Cir. 1985) (Counsel's "motive for disobeying the court is irrelevant as far as a finding of intent is concerned, rather it is the knowing failure to obey the court that forms the requisite intent"). Thus, "[criminal contempt is established when it is shown that the defendant is aware of a clear and definite court order and willfully disobeys the order." *Id.* at 1557, *quoting United States v. Rylander,* 714 F.2d 996, 1001-02 (9th Cir. 1983). *See also, Attorney Conduct as Justifying Summary Contempt Order Under Rule 42(a) of the Federal Rules of Criminal Procedure,* 58 A.L.R. Fed. 22 § 2(a) (2004). ("it generally has been held that an attorney's contemptuous conduct cannot be excused by his belief that his conduct is compelled by his duty properly to represent his client, and

punishment may be imposed under Rule 42(a) notwithstanding such belief").[11]

Respondent argues that he was duty-bound to defy the court's order because his client's Fifth Amendment rights were at stake. This is inaccurate. First, unlike the cases upon which Respondent relies, this is not a case in which the lawyer was held in contempt for advising a client to defy a court order. The order at issue in this case was an order directed *to the attorney,* directing him to consult with the client about whether to plead guilty or to withdraw from the plea agreement. The court made clear that if the client, after consultation, wished to choose the latter course, the court would accept that choice. Thus, the client was never at risk of being forced to make potentially incriminating statements. *Accord, Beckler v. Superior Court, Los Angeles County*, 568 F.2d 661, 663 n.4 (9th Cir. 1978) (distinguishing the case from those involving Fifth Amendment issues, since the order to produce documents was directed not at the defendant but at the attorney).

Second, as noted above, any statements the client made could not be used against him in any future proceedings if he ultimately withdrew his plea. Thus, his Fifth Amendment rights were fully protected. Respondent's

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[11] Because lawyers are fully aware of their obligation to comply with court orders, the court rejects Respondent's claim that a court must warn a lawyer that such an act constitutes contempt prior to issuing the contempt finding. *See, e.g., State v. Zahn*, 562 N.W.2d at 741 (No warning necessary when conduct – in that case, "refus[ing] to follow the judge's order and proceed[ing] to leave the courtroom" – is "clearly contemptuous."); *State v. Jones* (*In re Banks*), 726 S.W.2d at 521 and 523 (contempt finding against lawyer upheld; no preceding warning that refusing court order would be contempt).

defiance of the court's order was in no way justified by a need to protect his client's Fifth Amendment rights.

Respondent also argues that he could not be held in contempt because his conduct did not interfere with the proceedings. However, court proceedings do not have to be thrown into complete chaos before a court may impose a summary contempt sanction. By choosing to ignore a court order rather than appeal it, defense counsel "interfered with the orderly administration of justice and denigrated the dignity of the court." *Kidd v. Caldwell,* 371 So.2d at 252. "[T]here is an implicit standing order that parties, counsel, and courtroom attendees refrain from direct and egregious insults to judicial authority." *United States v. Marshall,* 371 F.3d 42, 48 (2nd Cir. 2004) (Criminal contempt sanctions authorized "whether or not a literal obstruction of justice occurs"). As stated by the Third Circuit, "overt physical disorder is not necessary to obstruct the administration of justice . . . We have not the slightest doubt that flouting a trial judges's commands is the essence of obstructing the administration of justice." *Local Union 542,* 552 F.2d at 509.

In this case, moreover, counsel's conduct *did* interfere with the proceedings. His refusal to comply with the court's order to consult with his client made it impossible for the hearing to proceed. This was not a matter of arguing with the court over a ruling on an objection or some other momentary delay. It put a complete halt to the proceedings, which were not resolved until a number of days later (when Mr. Barrows proceeded to plead guilty in compliance with the original plea agreement he had signed). "The face-to-face refusal to comply with the court's order itself constituted an affront to the court, and when that kind of refusal disrupts and frustrates an ongoing

proceeding, as it did here, summary contempt must be available to vindicate the authority of the court[.]" *United States v. Wilson,* 421 U.S. 309, 316 (1975). As the court in *Wilson* noted, "Rule 42(a) was never intended to be limited to situations where a witness uses scurrilous language, or threatens or creates overt physical disorder and thereby disrupts a trial." *Id.* at 315. The express, willful refusal to obey the court's order constituted clear contempt of court. The disrespectful manner in which it occurred and the fact that it brought to a halt an ongoing proceeding justified immediate action. The past history of unsuccessful attempts to remedy Respondent's discourteous and unprofessional conduct justified the sanction the court chose.

The motions to file amicus memoranda – albeit based upon an inaccurate understanding of the proceedings – raise the specter of defense attorneys being chilled in their advocacy as a result of the contempt finding in this case. However, the court is quite certain that "few effective lawyers would regard the tactics condemned here as either necessary or helpful to a successful defense." *Sacher v. United States,* 343 U.S. at 13. On point is another case in which the same specter was raised:

> Ellenbogen argues that upholding his contempt conviction will have a chilling effect on other attorneys' zealous advocacy on behalf of their clients. But this argument proves too much. The same contention could be made as to any contumacious behavior during a trial. Zealous advocacy of a client's cause is never a legitimate excuse for disobeying a clear ruling of the court, and convicting an attorney of contempt for actual disobedience will not chill criminal defense attorneys from zealous advocacy within the bounds of the law.

In re Ellenbogen, 72 F.3d 153, 158 (D.C. Cir. 1995). As the Supreme Court has noted, judges "rarely mistake zeal or heated words of a man fried with a desire to win, for the contemptuous conduct which defies rulings and deserves punishment. They recognize that our profession necessarily is a contentious one and they respect the lawyer who makes a strenuous effort for his client" *Sacher*, 343 U.S. at 12. In sum, this court cannot improve upon the Supreme Court's words:

> The rights and immunities of accused persons would be exposed to serious and obvious abuse if the trial bench did not possess and frequently exert power to curb prejudicial and excessive zeal of prosecutors. The interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders.
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> * * *
>
> [T]his Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence.

Sacher, 343 U.S. at 8, 13-14.

Conclusion

As noted above, the court had been faced over a period of months with repeated challenges to its authority, displays of anger, and other unprofessional conduct by Attorney Duckman. The court had taken the following steps to address the problems prior to this incident speaking

privately with Attorney Duckman; calling one of his superiors at the Defender General's Office to ask that they take action; having the Court Manager report to Respondent's superiors the incident in which he shouted at the Court Manager; making the court's expectations clear from the bench, on the record, in the courtroom; and advising Respondent previously that he was at risk of being held in contempt. Thus, Counsel was well aware of the court's expectations, and kinder and gentler efforts to modify his behavior had been unsuccessful.

If the conduct on August 30 had been the first incident of oppositional and disrespectful behavior by Attorney Duckman, the court likely would not have taken the action it did. Generally, the court seeks to speak at the bench or in chambers with attorneys about any issues with their courtroom behavior. With another attorney, that would have been the likely course of action. Here, however, the prior history with Attorney Duckman had made it clear that lesser steps would be ineffective. Given the interruption of the proceedings, the willful and disrespectful nature of the conduct, and the court's past experience with the attorney in question, it was apparent that a severe sanction was necessary to convey the message that such behavior was unacceptable.

Order

The motion to vacate the finding of contempt is denied.

Dated at Burlington, Vermont this 20th day of October, 2004.

/s/ Helen M. Toor
Helen M. Toor
Presiding Judge

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-483

APRIL TERM, 2006

In re Appeal of Duckman	APPEALED FROM:
	Addison District Court
	DOCKET NO. 390-9-04 Ancr
	(Filed Apr. 12, 2006)

In the above-entitled cause, the Clerk will enter:

Appellant's request that the Court take judicial notice of certain facts, filed January 10, 2005, is granted in part. We grant appellant's request as to items one through three; we deny his request with respect to item four.

FOR THE COURT:

/s/ John A. Dooley
John A. Dooley, Associate Judge

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-483

APRIL TERM, 2006

In re Appeal of Duckman	APPEALED FROM:
	Addison District Court
	DOCKET NO. 390-9-04 Ancr
	(Filed Apr. 26, 2006)

In the above-entitled cause, the Clerk will enter:

Appellant's motion for rearguement fails to identify points of law or fact overlooked or misapprehended by this court. The motion is therefore denied. See V.R.A.P. 40.

BY THE COURT:

/s/ John A. Dooley
John A. Dooley, Associate Justice

/s/ Denise R. Johnson
Denise R. Johnson, Associate Justice

/s/ Harold E. Eaton, Jr.
Harold E. Eaton, Jr. District Judge
Specially Assigned

/s/ Stephen B. Martin
Stephen B. Martin, Superior Judge,
Specially Assigned

/s/ Ernest W. Gibson, III
Ernest W. Gibson, III, (Ret.),
Associate Justice,
Specially Assigned